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No. 991501

In the Supreme Court of the United States

DONALD G. FORD, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 19 U.S.C. § 1615, the United States government is authorized to confiscate real and personal property in a civil forfeiture action based solely upon a showing of "probable cause" to believe that the property played some role in unlawful activity. To establish probable cause, which requires more than mere suspicion but less than prima facie proof of forfeitability, the government is permitted to rely exclusively on hearsay and on other evidence that is otherwise inadmissible at trial. Section 1615 authorizes the government, on the basis of such a showing, to effect a complete and permanent deprivation of real and personal property, unless the property owner is able to carry the burden of proving, by a preponderance of the evidence, *the existence of a negative*: that the property was *not* subject to forfeiture.

The question presented in this case is whether this allocation of the burden of proof violates the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

RULE 14.1 STATEMENT

The following are parties to this proceeding whose names do not appear in the caption:

1. Margaret J. Ford, claimant;

2. Tri-City Credit, Inc., claimant;

3. Regular Veterans Association, Inc., Louisville, Kentucky, Post 1, along with all affiliated ladies' auxiliaries and booster clubs, claimants;

4. Regular Veterans Association, Inc., Louisville, Kentucky, Post 2, along with all affiliated ladies' auxiliaries and booster clubs, claimants;

5. Regular Veterans Association, Inc., Louisville, Kentucky, Post 3, along with all affiliated ladies' auxiliaries and booster clubs, claimants;

6. Regular Veterans Association, Inc., Louisville, Kentucky, Post 4, along with all affiliated ladies' auxiliaries and booster clubs, claimants;

7. Regular Veterans Association, Inc., Louisville, Kentucky, Post 6, along with all affiliated ladies' auxiliaries and booster clubs, claimants;

8. Don Ford Cars, Inc., claimant;

9. Arcade Plaza, Inc., claimant;

10. Four Contiguous Parcels of Real Property situated in Louisville, Jefferson County, Kentucky, generally known and designated as 2901 South Seventh Street Road, 2915 South Seventh Street Road, 1600 Arcade Avenue, and 1530 Arcade Avenue, together with all buildings, improvements and appurtenances thereon, defendants;

11. One Parcel of Real Property situated in Shivley, Jefferson County, Kentucky, generally known and designated as 2902 South Seventh Street Road, together with all buildings, improvements and appurtenances thereon, defendant; and

12. Six Lots of United States Currency and Coin totaling $266,178.05, defendants.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-19a) is unreported. The opinion of the United States District Court for the Western District of Kentucky (App., *infra*, 20a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1999. A timely petition for rehearing was denied on December 10, 1999. App., *infra*, 39a-40a. Accordingly, a petition for a writ of certiorari is due on March 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." The relevant provisions of 18 U.S.C. §§ 981, 1955, 1956 and 1957 and 19 U.S.C. § 1615 are set forth at App., *infra*, 41a-43a.

STATEMENT

At issue in this case is the minimum showing required by the U.S. Constitution before the government may permanently deprive an owner of his real or personal property in a civil forfeiture action. Under 19 U.S.C. § 1615, the government is authorized to effect a complete and permanent deprivation of property – including the owner's home or other real property – based solely upon a showing of "probable cause," which in turn may be based exclusively upon hearsay and other evidence that would be inadmissible at trial. Unless the property owner can then prove by a preponderance of the evidence that his property is *not* forfeitable, the government is entitled to extinguish forever the owner's property rights. That burden of proof, we submit, does not come close to satisfying the requirements of the Due Process Clause of the Fifth

Amendment to the United States Constitution. The Sixth Circuit's cavalier rejection of petitioner's meritorious due process challenge cannot be squared with this Court's decisions in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), and plainly warrants further review.

A. The Statutory Framework For Civil *In Rem* Forfeitures Under 19 U.S.C. § 1615.

Section 1615 of Title 19 of the United States Code establishes the burdens of proof in civil *in rem* forfeiture actions grounded upon violations of various laws administered by the United States Customs Service. See 19 U.S.C. § 1615 (App., *infra*, 41a). See also, *e.g.*, 18 U.S.C. § 545 (forfeiture of goods smuggled into the United States); 19 U.S.C. § 1497(a) (forfeiture of undeclared articles subject to customs duties); 19 U.S.C. § 1584(a)(1) (forfeiture of merchandise not described in vessel's manifest); 19 U.S.C. § 1590(e) (forfeiture of aircraft used in smuggling); 31 U.S.C. § 5317(c) (forfeiture for failure to file report on certain monetary instruments or transactions). The burdens of proof established by Section 1615 subsequently have been incorporated into a number of statutes providing for the civil *in rem* forfeiture of property connected to a range of other illegal activities. See, *e.g.*, 8 U.S.C. § 1324(b)(3) (bringing in and harboring certain aliens); 15 U.S.C. § 11 (antitrust violations); 15 U.S.C. § 1177 (illegal gambling devices); 16 U.S.C. § 3374(b) (illegally taken fish and wildlife); 18 U.S.C. § 981(d) (various offenses); 18 U.S.C. § 1955(d) (illegal gambling business); 21 U.S.C. § 881 (narcotics crimes); 49 U.S.C. § 80303 (forfeiture of conveyances involved in the transportation of contraband).

Section 1615 provides, in pertinent part: "In all suits or actions * * * brought for [] forfeiture * * * where the property is claimed by any person, the burden of proof shall lie upon such claimant * * *: *Provided*, That probable cause shall be first shown for the institution of such suit or action * * *." 19 U.S.C. § 1615. Thus, in a civil *in rem* forfeiture action incorporating Section 1615, the government is first required to demonstrate

"probable cause" to believe that the subject property has played some role in the illegal activity at issue. See, *e.g.*, *United States* v. *$49,576 U.S. Currency*, 116 F.3d 425, 427 (9th Cir. 1997); *United States* v. *194 Quaker Farms Road*, 85 F.3d 985, 988 (2d Cir. 1996). The lower courts have generally understood "probable cause" in Section 1615 to mean a "reasonable ground for the belief of guilt supported by less than prima facie proof but more than mere suspicion." *United States* v. *$94,000 in United States Currency*, 2 F.3d 778, 782 (7th Cir. 1993) (internal quotation marks omitted). See also, *e.g.*, *United States* v. *United States Currency Deposited In Account No. 1115000763247*, 176 F.3d 941, 944 (7th Cir. 1999) ("The government need not make an actual showing of illegality, but must only show a probability or substantial chance of criminal conduct."). Under this widely accepted standard, "the Government does not need to make a connection between specific individuals and particular [illegal] transactions. * * * It need only show a 'sufficient nexus' between [illegal] activity and the property itself." *United States* v. *Leasehold Interest in 121 Nostrand Avenue*, 760 F. Supp. 1015, 1030 (E.D.N.Y. 1991) (Weinstein, J.) (quoting *United States* v. *4492 S. Livonia Rd.*, 889 F.2d 1258, 1269 (2d Cir. 1989)). See also, *e.g.*, *United States* v. *228 Acres of Land*, 916 F.2d 808, 812 (2d Cir. 1990) ("The Government must have probable cause to connect the property with narcotics activity, but need not link the property to a particular transaction.") (internal quotation marks and citation omitted).

The lower courts also are in agreement that the government may carry its burden of proving probable cause exclusively on the basis of evidence that would be *inadmissible at trial*, including hearsay testimony. See *United States Currency Deposited In Account No. 1115000763247*, 176 F.3d at 944 ("[h]earsay and other inadmissible evidence may be used in establishing probable cause"); *United States* v. *$191,910 in U.S. Currency*, 16 F.3d 1051, 1069 (9th Cir. 1994) ("The government need only show probable cause, and it can make this showing without introducing evidence that meets the ordinary criteria for trustworthiness and admissibility."); *United States* v.

$12,390.00, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting in part) ("The government, under the current approach, need not produce *any* admissible evidence and may deprive citizens of property based on *the rankest of hearsay and the flimsiest evidence.*") (emphasis added); *228 Acres of Land*, 916 F.2d at 812, 814 (probable cause demonstrated solely by hearsay evidence in the form of an affidavit of a single DEA agent); *United States v. $250,000 in United States Currency*, 808 F.2d 895, 899 (1st Cir. 1987) (probable cause showing "can be made wholly with otherwise inadmissible evidence").

Once the government has established probable cause, the burden shifts to the claimant to prove by a preponderance of the evidence that forfeiture is not warranted under the applicable statute. See, *e.g.*, *194 Quaker Farms Road*, 85 F.3d at 988. If the claimant fails to make a sufficient rebuttal, "the government's initial showing of probable cause will suffice to support the forfeiture." *United States Currency Deposited In Account No. 1115000763247*, 176 F.3d at 945.

B. The Proceedings Below.

1. This civil forfeiture action, and related criminal proceedings, arise out of the federal government's efforts to combat an illegal bingo operation in Louisville, Kentucky.[1] On March 26, 1993, the United States commenced this civil forfeiture action against five parcels of real property – on which were located a bingo hall, a meeting hall belonging to a veterans association and a residence occupied by persons not parties to this petition – and six lots of United States currency totaling $266,178.05. C.A. Jt. App. 21-27, 212-213. The government's complaint alleged that the real property was

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[1] In November 1996, during the pendency of this civil forfeiture action, petitioner Donald Ford was convicted after a separate federal trial of various counts of money laundering, in violation of 18 U.S.C. §§ 1956 and 1957, and conducting an illegal gambling business, in violation of 18 U.S.C. § 1955. See *United States v. Ford*, 184 F.3d 566 (6th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3524 (U.S. Feb. 22, 2000) (No. 99-1154); *United States v. Ford*, 176 F.3d 376 (6th Cir. 1999).

forfeitable under 18 U.S.C. §§ 981(a)(1)(A) and 1955(d), and that the six lots of currency were forfeitable solely under 18 U.S.C. § 1955(d). C.A. Jt. App. 21, 25-26. Section 981(a)(1)(A) of Title 18 provides for the forfeiture of "[a]ny property, real or personal, involved in a transaction or attempted transaction" that qualifies as money laundering under 18 U.S.C §§ 1956 and 1957. See App., *infra*, 41a. Section 1955(d) of Title 18 provides for the forfeiture of "[a]ny property, including money, used in" an illegal gambling business. See *id.* at 42a.

Petitioner Donald Ford timely filed a verified claim to all of the subject properties and an answer to the government's complaint. C.A. Jt. App. 120-125, 144-147.[2] In his answer, petitioner asserted as one of his affirmative defenses that the government's forfeiture action violated due process under the United States Constitution. *Id.* at 145.

The United States moved for summary judgment and an order of forfeiture with respect to all five parcels of real property and two of the six lots of currency originally named as defendants in the civil forfeiture complaint. C.A. Jt. App. 210-211. Petitioner opposed the government's motion, contending among other things that the statutory allocation of the burdens of proof under 19 U.S.C. § 1615, which is incorporated by reference in 18 U.S.C. §§ 981(d) and 1955(d), see App., *infra*, 41a-42a, violated the Due Process Clause of the Fifth Amendment. C.A. Jt. App. 433, 449-460.

2. The district court was sympathetic to petitioner's due process challenge, noting that "[s]ome courts have fairly criticized the standard of proof as being difficult to understand and as imposing too slight a burden on the United States." App., *infra*, 21a. Even so, the district court felt itself constrained to reject petitioner's constitutional arguments on the strength of Sixth Circuit precedent, explaining that "the Supreme Court ha[d] not undermined the Sixth Circuit law establishing the

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[2] Others who are not parties to this petition also asserted various ownership interests in the defendant properties. See pp. ii-iii, *supra*.

burden of proof," "ha[d] not found that civil forfeiture proceedings are in fact criminal proceedings," and "ha[d] not reconsidered the established burden of proof." *Id.* at 22a. Accordingly, on January 7, 1998, the district court ordered the forfeiture of four of the five parcels of real property and both lots of currency as to which the United States had sought summary judgment. *Id.* at 29a-30a. On January 28, 1998, the district court entered its final decree and order of forfeiture. *Id.* at 31a-35a.[3]

3. A divided panel of the Sixth Circuit affirmed. Like the district court, the majority rejected petitioner's invitation to revisit or reconsider the "standard practice in this circuit to place on claimants the evidentiary burden to show by a preponderance of the evidence that forfeiture is not warranted." App., *infra*, 7a (citing cases). Specifically, the majority rejected petitioner's argument that the Sixth Circuit's position had been called into question by the fact that other federal courts had begun to "suggest[] that the burden of proof provision is unconstitutional." *Id.* at 8a. In making that argument, petitioner pointed out that panels of the Ninth Circuit, in *United States v. $49,576.00 U.S. Currency*, 116 F.3d 425 (1997), and the Second Circuit, in *United States* v. *194 Quaker Farms Road*, 85 F.3d 985 (1996), had concluded that this Court's decisions in *Austin* v. *United States*, 509 U.S. 602 (1993), and *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), had "reopened" the question of whether the government's minimal burden of showing probable cause violates claimants' due process rights. Appellants' Br. at 13-14. Those decisions, petitioner further explained, also made clear that the appropriate test for resolving this question is the balancing test established in *Mathews*. *Ibid.*

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[3] At the request of the United States, the district court also dismissed the action with respect to the one parcel of real property as to which the court had denied forfeiture (on which the residence was located), as well as the remaining four lots of currency identified in the government's complaint but not included in the government's motion for summary judgment. See App., *infra*, 36a-38a.

In rejecting petitioner's argument, the majority reasoned that *Austin* and *James Daniel Good Real Property* had been limited to their facts by this Court's later decision in *United States* v. *Ursery*, 518 U.S. 267 (1996), which held that civil forfeitures do not constitute punishment within the meaning of the Fifth Amendment's Double Jeopardy Clause. App., *infra*, 8a. "Most importantly," however, in the view of the panel majority, was this Court's statement in *Ursery* that "'there is little doubt that *Congress intended these forfeitures [under 18 U.S.C. § 981] to be civil proceedings*,' [518 U.S.] at 289 (emphasis added), and that 'there is little evidence * * * suggesting that forfeiture proceedings under * * * 18 U.S.C. § 981(a)(1)(A), *are so punitive in form and effect as to render them criminal* despite Congress' intent to the contrary.' [518 U.S.] at 290 (emphasis added)." App., *infra*, 8a. The panel majority concluded that these considerations "militate[d] in favor of holding that claimants in gambling forfeiture cases are not entitled to hold the government to a burden of proof similar to that in criminal prosecutions." *Id.* at 8a-9a. Having rejected the beyond-a-reasonable doubt standard on this basis, the majority went on to declare without further explanation that the allocation of burdens under Section 1615 "does not violate the Due Process Clause." *Id.* at 9a. The panel did not address petitioner's argument that the *Mathews* test should be applied to determine the appropriate burden of proof to be borne by the government in a civil *in rem* forfeiture action.

Judge Clay dissented from the panel's opinion on the ground that "the allocation of the burden of proof in a civil forfeiture case under 19 U.S.C. § 1615 violates the Due Process Clause of the Fifth Amendment." App., *infra*, 14a (Clay, J., dissenting). Specifically, Judge Clay concluded that "due process requires that the government establish at minimum that forfeiture is supported by a preponderance of the evidence – a typical burden in civil proceedings – before the burden of proof may shift to the claimant to demonstrate that he is entitled to keep his property." *Id.* at 15a.

The dissent took issue with the majority's contrary holding in several respects. First, Judge Clay explained that the "quasi-criminal nature" of civil forfeiture proceedings "warrants constitutional safeguards of a high order." App., *infra*, 16a. Second, relying upon the opinions of the Second Circuit in *194 Quaker Farms Road* and of the Ninth Circuit panel in *$49,576.00 U.S. Currency*, Judge Clay emphasized that this Court's decision in *James Daniel Good Real Property* "made clear that claimants in civil forfeiture proceedings are entitled to protection under the Due Process Clause," and "that because rights in real property are so central in society, and because protection of due process is critical where real property may be lost, the government has an affirmative obligation to protect the claimant's interests in the forfeiture context." App., *infra*, 16a-17a. Judge Clay explained that such protections are not afforded to claimants by the current forfeiture scheme, under which, "[i]f the claimant sets forth evidence only equal to the government's – that is, probable cause to believe that forfeiture is not warranted – the government prevails and the property is lost." *Id.* at 18a. Finally, the dissent emphasized that the practical difficulties that often impede a claimant from aggressively contesting forfeiture, *e.g.*, incarceration and lack of money, militate in favor of imposing upon the government a burden of proof more stringent than the current one of probable cause. *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

This Court has made clear that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause, * * * is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). "Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases." *Ibid.* "At one end of the spectrum is the typical civil case involving a monetary

dispute between private parties," where plaintiff's "burden of proof is a mere preponderance of the evidence," reflecting the fact that "society has a minimal concern with the outcome of such private suits." *Ibid.* At the other end of the spectrum are criminal cases, where the government seeks to take away the liberty of an accused and where due process requires the government to satisfy the exacting burden of proof beyond a reasonable doubt. *Id.* at 423-24. In between these two extremes are "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant," where due process places on the government the intermediate burden of proof by "clear," "unequivocal" or "convincing" evidence, because "the interests at stake" are "particularly important." *Id.* at 424.

Judged against this traditional spectrum, the burden of proof imposed by 19 U.S.C. § 1615 in civil forfeiture actions is, as Judge Kozinski has observed, a "'constitutional anomaly.'" *United States* v. *$49,576.00 U.S. Currency*, 116 F.3d 425, 429 (9th Cir. 1997) (quoting 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 2.04, at 2-37 (1999)). Section 1615 authorizes the United States government to effect a complete and permanent deprivation of property – including the owner's home or other real property – based solely upon a minimal showing of "probable cause," a standard that is lower than even the lowest standard of proof traditionally used in civil actions between private parties. That anomaly is compounded by the fact that the government may demonstrate probable cause – which generally has been understood to require reasonable grounds for suspicion but less than prima facie proof of forfeitability – by relying exclusively on hearsay and other evidence that would be inadmissible at trial. Unless the property owner can then prove by a preponderance of the evidence *a negative* – that his property is *not forfeitable* – the government is entitled to extinguish forever the owner's property rights. That allocation of the burden of proof does not come close to satisfying the minimum requirements imposed

by the Due Process Clause of the Fifth Amendment to the United States Constitution.

Indeed, the Due Process Clause requires, at a minimum, that the government bear the burden of proving forfeitability by *clear and convincing evidence*. This Court has already concluded that this intermediate standard is constitutionally compelled when the government seeks to terminate parental rights, see *Santosky* v. *Kramer*, 455 U.S. 745, 768-69 (1982), or to effect a civil commitment, see *Addington*, 441 U.S. at 425-33. In addition, this Court has ruled on nonconstitutional grounds that the clear-and-convincing standard is appropriate, in light of the important interests at stake, when the government seeks to deport a resident alien or to denaturalize a naturalized citizen. See *Woodby* v. *INS*, 385 U.S. 276, 285-86 (1966); *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943); see also *Gonzales* v. *Landon*, 350 U.S. 920, 920 (1955) (per curiam) (same for expatriation proceedings). Although the interests at stake in these proceedings are weighty, they are no less significant than the fundamental right to property that is at stake in a civil forfeiture proceeding. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 62 (1993) ("Individual freedom finds tangible expression in property rights."); *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 236 (1897) ("[I]n a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."); *Boyd* v. *United States*, 116 U.S. 616, 627 (1886) ("The great end for which men entered into society was to secure their property.") (quoting *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765)).

The Sixth Circuit's cavalier rejection of petitioner's due process challenge to 19 U.S.C. § 1615 cannot be squared with these decisions. Nor is it consistent with *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which sets forth the applicable test for evaluating the procedural safeguards (including the burden of proof) required by the Due Process Clause. The Sixth Circuit completely ignored the *Mathews* test, even though this Court made clear in *James Daniel Good Real Property* that *Mathews*

applies to civil forfeiture actions. To resolve that conflict, clarify a fundamental constitutional issue of indisputable national importance, bring greater clarity to an area of law that has in recent years been characterized by increasing confusion, and correct the Sixth Circuit's manifestly incorrect decision, further review is warranted.

I. THE DECISION BELOW CONFLICTS WITH *MATHEWS* AND *JAMES DANIEL GOOD REAL PROPERTY*, AS WELL AS WITH THIS COURT'S DUE PROCESS CASES INVOLVING BURDENS OF PROOF

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), this Court made clear that identifying "the specific dictates of due process" with respect to governmental decisions that deprive individuals of liberty or property interests requires the balancing of three factors, specifically: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. The Court repeatedly has reiterated that *Mathews* provides the appropriate framework "[t]o determine the procedural protections the Constitution requires in a particular case." *Zinermon* v. *Burch*, 494 U.S. 113, 127 (1990). See also, *e.g.*, *Gilbert* v. *Homar*, 520 U.S. 924, 931 (1997) (explaining that "[t]o determine what process is constitutionally due, we have generally balanced [the] three distinct factors" identified in *Mathews*); *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982) ("In evaluating the procedures in *any case*, the courts *must* consider" the *Mathews* factors) (emphasis added).

In *Addington* v. *Texas*, 441 U.S. 418 (1979), and *Santosky* v. *Kramer*, 455 U.S. 745 (1982), this Court applied the *Mathews* factors in deciding what burden of proof a state government must satisfy in, respectively, a civil action to have a person involuntarily committed to a mental institution and a civil

action to permanently sever parents' rights in their natural child. The Court thus has clearly directed that *Mathews* supplies the appropriate test for determining generally what process is constitutionally required in a particular action, and specifically what burden of proof should be borne by the government when it seeks to deprive a person of liberty or property. Moreover, in *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), the Court – again applying *Mathews* – held that, absent exigent circumstances, due process requires the government to afford the record owner notice and a meaningful opportunity to be heard prior to seizing real property in a civil forfeiture proceeding. *Id.* at 62. Taken together, *Addington*, *Santosky* and *James Daniel Good Real Property* make clear that the question of what burden of proof the Due Process Clause requires should be determined through application of the *Mathews* test.

In the years since this Court's decisions in *Mathews*, *Addington* and *Santosky*, however, seven circuits – including the Sixth Circuit in this case – have been presented with due process challenges to Section 1615, but *none* has applied the *Mathews* test to resolve the issue. Three of these Circuits – the Sixth, Ninth, and Eleventh – have failed to apply *Mathews* even after this Court made it clear in *James Daniel Good Real Property* that *Mathews* applies with full force to civil forfeiture actions. See *United States* v. *$129,727.00 U.S. Currency*, 129 F.3d 486, 493-494 (9th Cir. 1997) (reaffirming earlier decision in *United States* v. *One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976), that *in rem* forfeiture was "not criminal enough to prevent Congress from imposing the burden of proof on the claimant"); *United States* v. *One Beechcraft King Air 300 Aircraft*, 107 F.3d 829, 830 (11th Cir. 1997) (because *in rem* forfeitures are civil proceedings, "Congress's decision to allocate the burden of proof to the claimant * * * is not unconstitutional"). Instead, each of the seven circuits has reasoned that the constitutionality of the probable cause burden turns upon whether such an action is properly characterized as civil or criminal in nature. Applying that rationale, each of these courts has concluded that

the probable cause burden survives constitutional scrutiny because civil *in rem* forfeitures are not criminal in nature.[4] As explained above, the Sixth Circuit's rejection of petitioners' due process challenge to Section 1615 turned upon the same analysis.

These cases conflict with this Court's decisions about the appropriate test for determining the burden of proof to be borne by the government in a civil *in rem* forfeiture action. This tension has not gone unnoticed by the federal judiciary. For example, in *United States* v. *$49,576.00 U.S. Currency*, 116 F.3d 425 (9th Cir. 1997), a panel of the Ninth Circuit, in an opinion authored by Judge Kozinski, explained that changes in constitutional doctrine had rendered "questionable" the Ninth Circuit's earlier holding in *United States* v. *One 1970 Pontiac GTO*, *supra*, that the probable cause standard of Section 1615 satisfied due process because "civil forfeiture proceedings were not 'criminal enough' to preclude Congress from exercising its power to set burdens of proof in civil cases." 116 F.3d at 428 (quoting *One 1970 Pontiac GTO*, 529 F.2d at 66). Judge Kozinski explained:

> The biggest doctrinal change occurred a month after *One 1970 Pontiac GTO* was decided: The Supreme Court, in *Mathews* v. *Eldridge*, * * * held that civil administrative proceedings which result in deprivations of property must provide meaningful due process safeguards. Subsequently, the Court specified that one such safeguard is the imposition of a heightened burden of proof on the government. *See, e.g., Santosky* v. *Kramer* * * *; *Addington* v. *Texas* * * *. And in *United States* v. *James Daniel Good Real Property*,

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[4] See also *United States* v. *$94,000 in United States Currency*, 2 F.3d 778, 783-784 (7th Cir. 1993); *United States* v. *Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989); *United States* v. *$250,000 in United States Currency*, 808 F.2d 895, 897, 900 (1st Cir. 1987); *United States* v. *$2,500 in United States Currency*, 689 F.2d 10, 14 (2d Cir. 1982). The Tenth Circuit applied the same rationale in a case decided prior to *Mathews*. See *Bramble* v. *Richardson*, 498 F.2d 968, 973 (10th Cir. 1974).

> * * * the Court made it clear that the *Mathews* v. *Eldridge* test applies to civil in rem forfeiture proceedings. * * * As a result, even if *One 1970 Pontiac GTO* is still good law, it cannot possibly preclude a *Mathews* v. *Eldridge* constitutional challenge.

Ibid. "We would find it surprising," Judge Kozinski explained, "were the Constitution to permit such an important decision [as whether property may be forfeited] to turn on a meager burden of proof like probable cause." *Id.* at 429.

Similarly, in *United States* v. *$12,390.00*, 956 F.2d 801 (8th Cir. 1992), Judge Beam, in dissent, rejected the rationale applied by the "[s]upporters of the current forfeiture regime": that "forfeiture cases, being civil in nature, and against a res, do not require strict standards [of proof]." *Id.* at 808 (Beam, J., dissenting in part). Explaining that "in the area of civil forfeitures, civil and criminal and res distinctions and dichotomies are inadequate legal fictions that have become overly strained," Judge Beam expressly followed this Court's decision in *Santosky* and applied the *Mathews* factors to test the constitutionality of the allocation of burdens under Section 1615. Judge Beam concluded that under *Mathews* it was a denial of due process to allow the government to divest a claimant of property "with a mere probable cause showing." *Id.* at 810-811.

In *United States* v. *194 Quaker Farms Road*, 85 F.3d 985 (2d Cir. 1996), Judge Winter, writing for the court, expressed doubt as to the "continued viability" of the Second Circuit's earlier decision in *United States* v. *$2,500*, *supra*, which rejected a due process challenge to Section 1615 on the ground that civil forfeitures were civil and non-punitive. 85 F.3d at 990 n.1. In *194 Quaker Farms Road*, the court explained that the rationale of *$2,500* had been undermined by this Court's holding in *Austin* that civil forfeitures constitute punishment for Eighth Amendment purposes, *id.* at 989, and then noted that "only one Court of Appeals opinion," namely, Judge Beam's partial dissent in *$12,390*, *supra*, had "conducted a full *Mathews* v.

Eldridge * * * analysis of the civil drug forfeiture statute's probable cause requirement," *id.* at 991 n.3. See also *United States* v. *Leasehold Interest in 121 Nostrand Avenue*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (Weinstein, J.) (explaining that, under *Santosky*, a court should apply the *Mathews* test "[t]o determine the appropriate standard of proof" in a civil forfeiture action, and concluding that, under *Mathews*, the imposition of a standard of proof on the government greater than probable cause "may be constitutionally mandated").[5]

The civil/criminal dichotomy employed by the federal courts of appeals also is in conflict with this Court's decision in *Austin*. In that case, the Court rejected the United States' argument that the Excessive Fines Clause of the Eighth

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[5] A number of commentators also have expressed the view that the allocation of burdens in civil *in rem* forfeiture actions is constitutionally deficient. See Mark A. Feldman, *Forfeiture: Probable Cause Must Go*, 20 Champion 37 (1996) (arguing that due process requires the government to bear a burden of proof higher than probable cause in civil forfeiture actions); David Scott Romantz, Note, *Civil Forfeiture And The Constitution – A Legislative Abrogation Of Rights And The Judicial Response: The Guilt Of The Res*, 28 Suffolk U. L. Rev. 387, 428-432 (1994) (arguing that this Court's decisions in *Austin* and *James Daniel Good Real Property* require, respectively, that the civil/criminal dichotomy be rejected and that *in rem* civil forfeiture actions comport with due process); Marc B. Stahl, *Asset Forfeiture, Burdens Of Proof And The War On Drugs*, 83 J. Crim. L. & Criminology 274, 279 (1992) (arguing that the allocation of burdens under Section 1615 violates due process); Lawrence A. Kasten, Note, *Extending Constitutional Protection To Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 Geo. Wash. L. Rev. 194, 194-197, 214-216, 236-244 (1991) (arguing that the full panoply of constitutional criminal safeguards, including a burden of proof on the government greater than probable cause, should apply to punitive civil forfeitures); George C. Pratt & William B. Peterson, *Civil Forfeiture In The Second Circuit*, 65 St. John's L. Rev. 653, 670 (1991) (concluding that, "if forfeitures are to be used aggressively, beyond their limited historical scope, then the procedures that govern their use," including the allocation of burdens of proof, "should be re-examined"); Peter Petrou, Note, *Due Process Implications Of Shifting The Burden Of Proof In Forfeiture Proceedings Arising Out Of Illegal Drug Transactions*, 1984 Duke L. J. 822, 823 (1984) (arguing that, under *Mathews* v. *Eldridge*, the allocation of burdens under Section 1615 violates due process).

Amendment could apply to a civil proceeding only if "that proceeding is so punitive that it must be considered criminal." 509 U.S. at 607. The Court concluded that, because the text of the Eighth Amendment is not expressly limited to criminal cases, the characterization of an action as civil or criminal was irrelevant to the question of the applicability of Excessive Fines Clause. See *id.* at 607-608. Instead, the Court held that, because "[t]he purpose of the Eighth Amendment * * * was to limit the government's power to punish," the relevant question in *Austin* was whether the civil forfeiture at issue was punishment. 509 U.S. at 609.

Similarly, the Due Process Clause of the Fifth Amendment is not limited to criminal actions. Instead, the purpose of procedural due process is to "impose constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment." *Mathews*, 424 U.S. at 332. As this Court has explained: "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. * * * Due process is flexible and calls for such procedural protections as the particular situation demands," *id.* at 334 (citations and internal quotation marks omitted). Consequently, the conclusion of the courts of appeals that civil forfeiture is not criminal in nature cannot be dispositive of the issue of what burden of proof is appropriate to these unique circumstances. See also *In re Winship*, 397 U.S. 358, 365-366 (1970) ("civil labels and good intentions do not themselves obviate the need for criminal due process safeguards").[6]

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[6] This Court's decision in *United States* v. *Ursery*, 518 U.S. 267 (1996), that civil *in rem* forfeiture is not punishment within the meaning of the Double Jeopardy Clause, is consistent with *Austin* in this regard. Because the Double Jeopardy Clause is not textually limited to criminal actions or punishments, the Court in *Ursery* looked to the purpose of the Clause for guidance as to its scope. The Court then explained that the Double Jeopardy Clause "prohibits the Government from punishing twice, or attempting a second time to punish criminally for the same offense," 518 U.S. at 273 (citation and internal

Finally, the Sixth Circuit's approval of Section 1615's allocation of the burden of proof is incompatible with this Court's cases holding that due process mandates the imposition of a clear-and-convincing standard on the government in proceedings to terminate parental rights, see *Santosky* v. *Kramer*, 455 U.S. 745, 768-769 (1982), and to effect a civil commitment, see *Addington*, 441 U.S. at 425-433. Although the interests at stake in these proceedings are weighty, so too is the fundamental right to property that is at stake in a civil forfeiture proceeding. See, *e.g.*, *James Daniel Good Real Property*, 510 U.S. at 62 ("Individual freedom finds tangible expression in property rights."). As Judge Kozinski has correctly noted, "The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes." *United States* v. *$49,576.00 U.S. Currency*, 116 F.3d 425, 429 (9th Cir. 1997); accord *United States* v. *$12,390.00*, 956 F.2d 801, 807 (8th Cir. 1992) (Beam, J., dissenting in part) ("Private ownership of property holds a special place in our society, see U.S. Const. amend. V., as it does in most democratic societies."). Under *Santosky* and *Addington*, Section 1615 is unconstitutional.[7]

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quotation marks omitted), and further explained — relying upon the Court's earlier decisions — that the punishments to which the Double Jeopardy Clause applies are those that are essentially criminal in character, see *id.* at 274-278 (discussing the rationales of *Various Items Of Personal Property* v. *United States*, 282 U.S. 577 (1931), *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), and *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984)). Consequently, for Double Jeopardy purposes, the issue of whether a sanction is civil or criminal in character is significant. For the reasons set forth above, however, such is not the case when a court is determining what process is constitutionally required in civil *in rem* forfeiture proceedings.

[7] Although this Court has never considered a due process challenge to Section 1615, it has indicated in cases pre-dating *Mathews* and its progeny that, where Congress has not provided otherwise, the appropriate burden of proof to be borne by the government in a civil forfeiture case is proof by a preponderance of the evidence. See *Lilienthal's Tobacco* v. *United States*, 97

II. THE SIXTH CIRCUIT'S DECISION ON A RECURRING ISSUE OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE IS MANIFESTLY INCORRECT

Further review also is warranted to correct the Sixth Circuit's erroneous analysis on an issue of fundamental constitutional importance, specifically, whether due process is satisfied when the government is able to permanently and completely deprive a person of real and personal property upon a showing of probable cause – a showing that can be made with evidence that would be inadmissible in the trial of any other cause of action. In answering this question affirmatively, the Sixth Circuit ignored this Court's direction in *Mathews* that due process is a "flexible" concept, the protections of which depend upon the unique demands of the situation at issue. See 424 U.S. at 334. Instead, the Sixth Circuit resorted to an inflexible test grounded solely upon the categorization of civil *in rem* forfeiture proceedings as either civil or criminal in nature. Proper balancing of the *Mathews* factors – the private interest involved, the risk of erroneous deprivation and the government's interests – makes it clear that the probable cause standard of Section 1615 denies claimants such as petitioner due process of law under the Fifth Amendment.[8]

U.S. (7 Otto) 237, 265-268 (1877) (customs forfeiture for failure to pay requisite duties). See also *United States* v. *Regan*, 232 U.S. 37, 48 (1914) (holding that the preponderance standard applies to cases in which the government seeks to recover a civil monetary penalty). This Court's decisions in *Santosky* and *Addington*, however, support the imposition of an even higher burden of proof on the government – proof by clear and convincing evidence.

[8] The fact that Congress presently is considering several bills that would impose a heightened burden of proof on the government in civil forfeiture actions, see H.R. 1658, 106th Cong. (1999) (clear and convincing evidence); S. 1701, 106th Cong. (1999) (preponderance of the evidence); S. 1931, 106th Cong. (1999) (same), does nothing to lessen the need for this Court to resolve the issue immediately. Although the House bill passed in June of last year, the Senate bills still are under review by the Senate Committee on the Judiciary. In the interim, thousands of forfeiture actions will proceed under the current allocation of burdens under Section 1615. Moreover, there is no guarantee that the legislation will become law, leaving unresolved the due

A. Whether The Probable Cause Burden Of 19 U.S.C. § 1615 Violates Due Process Is A Question Of Fundamental Constitutional Import.

This Court has explained that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. * * * The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (citation and internal quotation marks omitted). Thus, "standards of proof are important for their symbolic meaning as well as for their practical effect." *Id.* at 426. See also *Speiser* v. *Randall*, 357 U.S. 513, 520-521 (1958) ("[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."). As explained above, see pp. 8-9, *supra*, this fundamental principle has driven the evolution of "three standards or levels of proof" for application to different cases, none of which permits the plaintiff to prevail solely upon a showing of probable cause. *Id.* at 423.

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process question that is squarely presented by this case. As the United States acknowledged below, "[s]ince the mid-1990's, a string of previous efforts to legislate changes to the existing civil forfeiture scheme have been unsuccessful." U.S. Response to Pet. for Reh'g at 4. Finally, at least two of the bills presently before Congress, H.R. 1658 and S. 1931, expressly exempt from their coverage civil forfeitures under the customs laws, to which the allocation of burdens under Section 1615 would continue to apply. See H.R. 1658, 106th Cong. § 2 (1999) (excepting the Tariff Act of 1930 from the definition of "civil forfeiture statute"); S. 1931, 106th Cong. § 2 (1999) (excepting the Tariff Act of 1930 "or any other provision of law codified in title 19" from the definition of "civil forfeiture statute"). Thus, even if the legislation presently under consideration is enacted, the due process question will persist with respect to customs forfeitures.

In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the Court confirmed that probable cause is not a part of the continuum of standards of proof appropriate to formal trials. Quoting Chief Justice Marshall's opinion for the Court in an early civil *in rem* forfeiture case, the *Gates* Court explained that "[a]s early as *Locke* v. *United States*, 7 Cranch. 339, 348, 3 L. Ed. 364 (1813), Chief Justice Marshall observed * * * that 'the term probable cause, according to its usual acceptation, means *less than evidence which would justify condemnation* * * *. It imports a seizure made under circumstances which warrant suspicion.'" *Gates*, 462 U.S. at 235 (emphasis added) (internal quotation marks omitted). Against the probable cause standard, the Court contrasted the "[f]inely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence," which it described as "the quanta * * * of proof appropriate in ordinary judicial proceedings." *Ibid.*

Applying the Court's teaching that standards of proof carry symbolic and practical meaning to the allocation of burdens under Section 1615 immediately illustrates the constitutional infirmity of that statute. Although the purpose of procedural due process is to "impose[] constraints on *governmental* decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment," *Mathews*, 424 U.S. at 332 (emphasis added), Section 1615 places almost the entire risk of an erroneous outcome on the *claimant*. The symbolic and practical import of this allocation of burdens is unmistakable: where private property (and, implicitly, its owner) have been tainted by possible connection to unlawful activity, our society is virtually unconcerned with preventing an erroneous deprivation. The Due Process Clause of the Fifth Amendment, as applied through the *Mathews* test, cannot tolerate such a process, for the reasons discussed below.[9]

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[9] The conclusion that due process requires the government to bear the burden of proof at least by a preponderance of the evidence finds support in the "contemporary practices" of the States. *Connecticut* v. *Doehr*, 501 U.S. 1,

B. The Private Interests At Stake In Civil Forfeiture Actions Are At The Very Core Of The Constitutional Guarantee Of Due Process.

The protection of individual rights in property, whether real or personal, is at the very heart of the Due Process Clause's limitation on governmental power. In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), this Court explained that "the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Id.* at 81. The Court has repeatedly reiterated this fundamental principle. See *James Daniel Good Real Property*, 510 U.S. at 62 ("Individual freedom finds tangible expression in property rights."); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other."); *Miranda* v. *Arizona*, 384 U.S.

16, 17-18 (1991). Virtually all of the States impose on the government a burden of proof in civil forfeiture actions of at least a preponderance of the evidence, with a number requiring the government to prove its case by clear and convincing evidence. See generally 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 11.03, at 11-36.1 & n.69 (1999) ("[a]lmost all states place the burden of proof on the government in civil forfeiture cases"); *State* v. *Spooner*, 520 So.2d 336, 347 n.7 (La. 1988) (discussing forfeiture schemes of other states). See also, *e.g.*, ARIZ. REV. STAT. ANN. § 13-4311(M) (preponderance of the evidence); CAL. HEALTH & SAFETY CODE §§ 11470, 11488.4(i)(1)-(4) (requiring state to use criminal forfeiture in most cases, with proof of forfeiture beyond a reasonable doubt; where permitted, a civil forfeiture case must be proven by clear and convincing evidence); CONN. GEN. STAT. § 54-36h (b) (clear and convincing evidence); COLO. REV. STAT. ANN. § 16-13-504(2.1)(a) (preponderance of the evidence); FLA. STAT. ch. 932.704(8) (state must prove its case by clear and convincing evidence); IDAHO CODE § 37-2744(d) (preponderance of the evidence); ME. REV. STAT. ANN. tit. 15, § 5822(3) (preponderance of the evidence); MINN. STAT. ANN. § 609.531 subd. 6 (clear and convincing evidence); N.H. REV. STAT. ANN. § 318-B:17-b(IV)(b) (preponderance of the evidence); VT. CODE ANN. § 18-4244(c) (clear and convincing evidence); WIS. STAT. ANN. § 973.076(3) (requiring proof "satisfying or convincing to a reasonable certainty").

436, 539 (1966) (White, J., dissenting) ("[T]he most basic function of any government" is to "provide for the security of the individual and of his property."); *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 236 (1897) ("Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."); *Boyd* v. *United States*, 116 U.S. 616, 627 (1886) ("The great end for which men entered into society was to secure their property.") (quoting *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765)). Justice Kennedy has stated that "any system that wishes to protect freedom has to protect property." 6 *Newsletter of the Comm'n on the Bicentennial of the U.S. Constitution* No. 3, at 1 (1990).

Because of the overriding constitutional value placed upon property rights, this Court has emphasized that they are to carry substantial weight in the *Mathews* analysis. In *James Daniel Good Real Property*, the Court stated that "the private interests at stake in the seizure of real property weigh heavily in the *Mathews* balance." 510 U.S. at 54-55. Private interests in personal property also are accorded substantial weight under the *Mathews* test. See *id.* at 54 (explaining that in *Fuentes* v. *Shevin*, the Court "held that the loss of kitchen appliances and household furniture was significant enough to warrant a predeprivation hearing."). See also *id.* at 77-78 (O'Connor, J., concurring in part and dissenting in part) ("The Fifth Amendment * * * is concerned with deprivations of property interests; for due process analysis, it should not matter whether the property to be seized is real or personal, home or not. The relevant inquiry is into the governmental interference in whatever property is at issue * * *."); *Fuentes*, 407 U.S. at 90 (explaining that, "if the root principle of procedural due process is to be applied with objectivity, it cannot rest on [] distinctions" between types of private property).

In the instant case, far more is at stake than the mere temporary pre-judgment seizure of private property that was at issue in *James Daniel Good Real Property* and *Fuentes*. Claimants in civil forfeiture actions are threatened with a

permanent and *absolute* deprivation of real and personal property. In *Santosky*, in which the Court held violative of due process a state's ability to permanently sever parental rights under a preponderance standard, the Court emphasized that "[w]hether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than *average* certainty on the part of the factfinder turns on both the nature of the private interest threatened and the *permanency* of the threatened loss." 455 U.S. at 758 (emphasis added). Claimants in a civil forfeiture action, however, may be permanently deprived of their property on a showing by the government that assures far less than the "average certainty" provided by the preponderance standard found inadequate by the Court in *Santosky*.

Moreover, a claimant in a civil forfeiture action has a substantial interest in avoiding, where unwarranted, the stigma that is associated with civil *in rem* forfeiture proceedings – proceedings which this Court has characterized as quasi-criminal. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965); *Boyd* v. *United States*, 116 U.S. 616, 634 (1886). In *Addington*, the Court recognized that "the risk to the defendant of having his reputation tarnished erroneously" that inheres "in civil cases involving allegations of fraud or some other *quasi-criminal wrongdoing* by the defendant" is "more substantial than [the] mere loss of money" generally at stake in a civil action, thus warranting the imposition on the government of a burden of proof greater even than a preponderance of the evidence. See 441 U.S. at 424 (emphasis added). Furthermore, in *Austin*, the Court held that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment" directed at the property owner for permitting his property to be used unlawfully. 509 U.S. at 618. See also *One 1958 Plymouth Sedan*, 380 U.S. at 700 (the object of a forfeiture proceeding "is to penalize for the commission of an offense against the law"). Where, as in the instant case, forfeiture punishes the owner for allowing his property to play a role in

a criminal offense, the opprobrium cast upon the property's owner is severe. See *Austin*, 509 U.S. at 619-620.

The weight of a claimant's interest in avoiding wrongful punishment was acknowledged by the Department of Justice itself in its own proposed forfeiture reform legislation, the Forfeiture Act of 1994. Citing *Austin*, the Department explained that a change in the burden of proof – specifically, requiring the United States to prove a civil *in rem* forfeiture case by a preponderance of the evidence – "is warranted in light of the recognition by the courts that civil forfeiture actions are punitive in nature and serve as adjuncts to law enforcement." Forfeiture Act of 1994, § 10 (DOJ section by section analysis). Similarly, the Second Circuit, per Judge Winter, and a panel of the Ninth Circuit, per Judge Kozinski, have concluded that the punishment rationale of *Austin*, combined with this Court's subsequent expansion – in *James Daniel Good* – of the due process protections available in civil forfeiture actions, require reconsideration of the constitutionality of the allocation of burdens under Section 1615. See *United States* v. *194 Quaker Farms Road*, 85 F.3d 985, 990 (2d Cir. 1996) ("*Good* and *Austin* reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant in rem allowing seizure – probable cause – suffices to meet the requirements of due process"). See also *United States* v. *$49,576.00 U.S. Currency*, 116 F.3d 425 (9th Cir. 1997) (agreeing with the Second Circuit's conclusion in *194 Quaker Farms Road*, and stating that "[w]e would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause").

C. Allowing The Government To Obtain Forfeiture Of Private Property Solely On A Showing Of Probable Cause Poses An Extreme Risk Of Erroneous Deprivation.

The risk of erroneous, and irreversible, deprivation of private property created by the allocation of burdens in Section 1615 is extremely high because, as pointed out by Judge Beam

in his partial dissent in *United States* v. *$12,390.00*, "the current allocation of burdens and standards of proof requires that the claimant prove a negative, that the property was not used in or to facilitate illegal activity, while the government must prove almost nothing." 956 U.S. at 811 (Beam, J., dissenting in part). See also *United States* v. *$191,000 in U.S. Currency*, 16 F.3d 1051, 1069 (9th Cir. 1994) (explaining that the burden of proof established by 19 U.S.C. § 1615 "involves a serious risk that an innocent person will be deprived of his property"). As explained earlier, to carry its probable cause burden, "the Government does not need to make a connection between *specific* individuals and *particular* [illegal] transactions. * * * It need only show a 'sufficient nexus' between [illegal] activity and the property itself." *United States* v. *Leasehold Interest in 121 Nostrand Avenue*, 760 F. Supp. 1015, 1030 (E.D.N.Y. 1991) (Weinstein, J.) (quoting *United States* v. *4492 S. Livonia Rd.*, 889 F.2d 1258, 1269 (2d Cir. 1989)) (emphasis added). See also, *e.g.*, *United States* v. *228 Acres of Land*, 916 F.2d 808, 812 (2d Cir. 1990) ("The Government must have probable cause to connect the property with narcotics activity, but need not link the property to a particular transaction.") (internal quotation marks and citation omitted). Consequently, unless the claimant is able to explain away by a preponderance of the evidence every scenario that might connect the property to illegal activity, the property will be forfeited. See, *e.g.*, *United States* v. *One Mercedes Benz*, 846 F.2d 2, 5 (2d Cir. 1988) (affirming forfeiture of an automobile in which less than twenty-five grams of marijuana was found, an amount too small to be a crime in the state in which discovery occurred, on the ground that "the transportation of any quantity of drugs however minute is * * * sufficient to merit forfeiture of the vehicle"). Most startling, however, is that the United States is permitted to satisfy its already minimal burden of proving probable cause with evidence, such as hearsay, whose lack of reliability has, for centuries, rendered it inadmissible in any other trial, civil or criminal. In short, "all risks are squarely on the claimant." *$12,390.00*, 956 F.2d at 811 (Beam, J., dissenting in part).

Compounding the risk of error inherent in the probable cause standard is that, as pointed out by Judge Clay in his dissent from the Sixth Circuit's decision in this case, the typical claimant "is at a severe litigation disadvantage during the course of a forfeiture proceeding." App., *infra*, 19a. (Clay, J., dissenting). There are two reasons for this. First, the typical claimant often is incarcerated while the forfeiture action is pending, making aggressive opposition difficult at best. See 1 *Prosecution and Defense of Forfeiture Cases*, ¶ 11.03[9], at 11-35 to 11-36.1. Moreover, "[t]he high cost of retaining counsel and investigators (and posting a cost bond) makes it uneconomical to fight most civil forfeitures because the value of the property is generally less than the cost of the litigation." *Id.* at 11-36.1.

Against such claimants are arrayed the vast resources of the United States government. In *Santosky*, in which this Court held that the risk of erroneous termination of parental rights weighed in favor of imposing a clear and convincing burden of proof on the state, the Court emphasized that "the State's ability to assemble its case almost inevitably dwarfs the parent's ability to mount a defense." 455 U.S. at 763. The same readily can be said with respect to the relative resources of the United States and claimants in civil forfeiture actions. As in *Santosky*, there are "[n]o predetermined limits [that] restrict the sums [the government] may spend in prosecuting a given [forfeiture] proceeding," *ibid.*, and the primary witnesses who are called upon to establish probable cause are the same agents whom the government has empowered to investigate the alleged connection of the property to criminal activity, see *ibid.*

Finally, the government's direct pecuniary interest in the outcome of civil forfeiture actions creates powerful incentives for overzealous action on its part. Forfeited cash and proceeds from the sale of other forfeited property are deposited in the Asset Forfeiture Fund, an account in the Department of the Treasury. See U.S. Dep't of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program: Fiscal Years 1995 and 1996*, at 2 ("*Forfeiture Report For 1995 & 1996*"). Those monies then are used by the Department to fund its continued

forfeiture efforts or for other law enforcement activities. *Id.* at 2, 5. Since 1985, more than $4.3 billion has been deposited into the Fund. *Id.* at 5. A recent report of the House of Representatives Committee on the Judiciary noted that "[a]s of the end of 1998, a total of 24,903 seized assets valued at $1 billion were on deposit – 7,799 cash seizures valued at $349 million, 1,181 real properties valued at $205 million, 45 businesses valued at $49 million, and 15,878 other assets valued at $398 million." H.R. 106-192, at 4-5 (1999).

This mechanism, which allows federal law enforcement agencies to avoid the ordinary government appropriations and budgetary processes, has "lead[] some observers to question whether we are seeing fair and effective law enforcement or an insatiable appetite for a source for increased agency revenue." *$12,390*, 956 F.2d at 807 n.6 (Beam, J., dissenting in part). Indeed, this Court acknowledged in *James Daniel Good Real Property* the additional risk of error that such a substantial governmental pecuniary interest may introduce into a civil forfeiture proceeding. See 510 U.S. at 56. Because the private interests involved are at the very core of the constitutional guarantee of due process, the risk of erroneous deprivation under Section 1615 is intolerable and demands review by this Court.

D. The Government's Interest In Avoiding Erroneous Deprivations Of Private Property Outweighs Any Additional Burdens Resulting From A Heightened Standard of Proof.

This Court has acknowledged that the alteration of the standard of proof to be borne by the government in a trial does not impose significant additional financial or administrative burdens: "Unlike a constitutional requirement of hearings * * * or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Santosky*, 455 U.S. at 767. The government presumably already engages in a process of gathering evidence purporting to show the requisite nexus

between the property to be forfeited and the predicate illegal activity, so the imposition of a heightened burden of proof on the government should not alter that process at all. And even if such a heightened burden would force the government to acquire more or better evidence than presently necessary to obtain a forfeiture, any additional financial or administrative burden is likely to be minimal, and, in any event, is outweighed by the private interest at stake.

Nor will heightening the government's standard of proof undermine its interest in achieving any law enforcement objectives served by the forfeiture statutes. To the contrary, the government's interest in enforcing the law always must be tempered by its obligation to do justice, an essential component of which is ensuring that people are not erroneously punished. See *Addington*, 441 U.S. at 427 ("The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."). As explained in the preceding section, however, it is the claimant in a civil forfeiture action who bears virtually all the risk of being erroneously harmed. Consequently, the probable cause standard plainly disserves the government's interest in ensuring that justice is done.

Finally, the practical interests that once may have justified forfeiture on a showing by the government of probable cause no longer exist. The allocation of burdens in § 1615 traces its history directly to Section 27 of the Act of July 31, 1789, which was enacted by the first Congress. As one commentator has explained:

> Because Customs duties and excise taxes on liquor and tobacco constituted the principal source of federal revenue from 1789 until the First World War, when the Constitution was amended to permit a tax on income, it was necessary to have harsh and effective laws to deter smuggling and other attempts to evade payment of customs duties and excise taxes.

> Protection of the federal fisc was the *main purpose* served by our early forfeiture laws.

1 *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-1. Moreover,

> [i]n the earliest years of the Republic, the Executive Branch was absurdly small. The government had no employees or resources with which to conduct investigations. * * * Today the federal government has tremendous investigative resources. Thus, proving the "guilt" of the property in a civil forfeiture normally presents no problem. Moreover, if the government should happen to lose a few forfeiture cases, the government's very existence will not be jeopardized as it no longer depends heavily on customs revenues and excise taxes.

Id., ¶ 11.03, at 11-34.2. This Court recognized this drastic change in the federal government's circumstances in *James Daniel Good*, holding that "executive urgency" no longer could justify *ex parte* seizures of property sought to be forfeited. 510 U.S. at 59-60.

Accordingly, the government's interests do not weigh against, but instead weigh in favor, of requiring it to bear a heightened burden of proof in forfeiture actions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 98-5292 and 98-5317

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

FOUR CONTIGUOUS PARCELS OF REAL PROPERTY SITUATED IN LOUISVILLE, JEFFERSON COUNTY KENTUCKY, ET AL., *Defendants*

DONALD G. FORD; TRI-CITY CREDIT, INC.; MARGARET J. FORD, *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky

[FILED September 1, 1999]

Before: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

PER CURIAM. Claimants Donald Ford, Margaret Ford, and Tri-City Credit, Inc. appeal the district court's grant of summary judgment for the government in this civil forfeiture action. Donald Ford was convicted of various federal crimes related to the operation of an illegal bingo gambling operation in Louisville. On appeal, claimants contend, *inter alia*, that a hall owned by a sham charity set up by Donald Ford (where no gambling took place) and two stashes of currency should not have been subject to forfeiture. Finding that the grant of summary judgment to the government was proper, we affirm.

I.

In 1989, claimant-appellant Donald Ford [1] and his then-wife, claimant-appellant Margaret Ford,[2] purchased four parcels of real property in Louisville, Kentucky. Shortly after purchasing this property, Ford built a large bingo hall on three of the four parcels, which he planned to rent to charities wishing to conduct bingo games [3] as a fund-raising activity. Ford sold the bingo hall to Clay Ballinger in November 1990, but when Ballinger defaulted on his payments to Ford in December 1991, Ford reassumed possession of the property.

The Regular Veterans Association (RVA) is a national organization that purports to assist veterans and members of the military. The RVA is registered with the Internal Revenue Service as a fraternal organization, not as a charitable or religious organization. On December 30, 1991, Ford and several of his friends and family members convened to hold the first meeting of the first RVA post [4] (hereinafter referred to as "RVA Post #1") in the Louisville area. [5] The president of Post #1 was an employee of Ford's used car business, the vice president was Ford's son, and Ford was the acting chairperson. At this meeting, Ford loaned $50,000 to the post.

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[1] Donald Ford will simply be referred to as "Ford" in this fact section, since his ex-wife Margaret was not significantly involved with the illegal gambling operation.

[2] Margaret Ford divorced her husband in 1995. Pursuant to the divorce settlement agreement, Margaret Ford executed a quitclaim to Donald Ford of all of the real and personal property that is the subject of this litigation.

[3] "Charitable gaming" can be a defense to prosecution for illegal gambling under Kentucky law. *See* KY. REV. STAT. § 528.140.

[4] Ford had previously registered RVA Post #1 with the Jefferson County (Kentucky) Clerk on December 19, 1991.

[5] Four other RVA posts, four RVA "boosters" posts, and five RVA "ladies auxiliary" posts were registered by Ford and his colleagues between December 27, 1991 and June 6, 1992.

On February 14, 1992, Ford and his then-wife purchased a meeting hall located directly across the street from the bingo hall for $144,000. On February 21, 1992, this meeting hall (hereinafter referred to as the "RVA Hall") was purchased from Ford by RVA Post #1 for $375,000. The contract for the sale of the property reveals that RVA Post #1 paid Ford $75,000 in cash on the contract's execution date, with the balance ($300,000) to be paid in monthly installments through March 1997. RVA Post #1 paid Ford $19,122 towards this balance due on July 14, 1992. Since buying the RVA Hall, RVA Post #1 has also paid $74,000 for repairs and renovations of, and furnishings for, the hall. The post also repaid Ford's initial $50,000 loan on February 20, 1992. RVA Post #1's only known source of income was provided by the bingo gambling that the post conducted at Ford's bingo hall.

Ford admits that he had effective control of the posts constituting the local RVA organization. RVA-sponsored gambling events began at the bingo hall in December 1991, soon after Ford's repossession of the bingo hall. The vast majority of gaming sessions conducted at Ford's bingo hall from January 1, 1992, through August 28, 1992, were run by the local RVA posts. Ford charged the RVA posts rent for each bingo session, which he collected from the proceeds of each session. The proceeds from bingo games conducted at the hall were deposited daily into the checking account of Ford's closely-held corporation, but only periodically distributed to the RVA posts. Profits from the bingo hall's concession stand, which operated during RVA-sponsored bingo nights, were also paid to Ford's corporation.

Ford possessed hoards of cash that were located in safety deposit boxes at various banks around Louisville. One of these cash hoards, amounting to $6,925, was located at a branch of the Bank of Louisville at 3450 Taylor Boulevard. There is overwhelming evidence in the record that demonstrates that this safety deposit box was used to store the proceeds from

bingo games held at the bingo hall.[6] Another one of these cash hoards, amounting to $175,500, was located at a branch of the Bank of Louisville at 4208 Bardstown Road. Ford made eight separate entries into this deposit box after he had reassumed ownership of the bingo hall, and each of those entries occurred within thirty hours of an entry into the Taylor Boulevard box. A police investigator avers that Ford indicated that he used "quite a few lock boxes around town" in order "to handle cash" and "to make change." Ford had no other known source for large sums of money than the bingo hall.

Following an investigation conducted by the Internal Revenue Service and local law enforcement officials, the government filed a verified civil forfeiture complaint to obtain real property and seized cash recovered by Louisville police during the execution of a search warrant on the bingo hall, and RVA Hall, and the various safety deposit boxes Ford had rented. Among the grounds alleged for the forfeiture was the property's use in an illegal gambling business, in violation of 18 U.S.C. § 1955, and involvement in financial transactions in criminally-derived property, in violation of 18 U.S.C. § 1957. The complaint alleged that the forfeiture was authorized by 18 U.S.C. § 1955(d) and 18 U.S.C. § 981(a)(1)(A). In April 1993, Ford, his then-wife Margaret, and a corporate entity he

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[6] Since Ford does not argue on appeal that this box was not used in the illegal gambling operation, and the evidence in the record overwhelmingly indicates that the box was used for such purposes, it is not necessary to describe the facts surrounding the money in the Taylor Boulevard safety deposit box in detail. The government contends that Ford essentially "cleaned out" the Taylor Boulevard box on July 16, 1992, drove to Atlantic City, New Jersey, and placed the money in safety deposit boxes in Atlantic City casinos. Government agents recovered $620,610 from two safety deposit boxes in Atlantic City.

controlled (claimant-appellant Tri City Credit, Inc. [7]) asserted claims to the property at issue in the instant action.

In August 1993, a federal grand jury indicted Ford and a co-defendant, Sandra Hutchins, on violations of 18 U.S.C. §§ 1955, 1956, and 1957. In Count 38 of the indictment, the government sought criminal forfeiture of various pieces of property used in connection with violations of 18 U.S.C. §§ 1956 and 1957. On April 29, 1996, Ford moved in the instant action to suppress all of the evidence obtained in the search by the Louisville police. On February 12, 1997, the district court presiding over the instant action denied Ford's motion on collateral estoppel grounds, because the court presiding over the criminal action had denied Ford's motion to suppress in that case.

Ford was tried and convicted in the criminal action on November 22, 1996 of two counts of violating 18 U.S.C. § 1995 (illegal gambling), one count of violating 18 U.S.C. § 1956 (money laundering), and twenty-six counts of violating 18 U.S.C. § 1957 (engaging in monetary transactions in criminally-derived property). Pursuant to Count 38 of the indictment, the jury indicated (via special verdict form) whether or not certain pieces of property allegedly used in the criminal operation should be forfeited. The special verdict form asked the jury for the percentage of the RVA Hall which should be forfeited to the government, pursuant to Count 34 of the indictment (alleging *only* a violation of 18 U.S.C. § 1956); the jury indicated "0%." Ford's convictions were recently affirmed by this court. *See*

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[7] Donald Ford filed his claim on behalf of both himself and on behalf of Tri-City Credit, Inc. The district court apparently did not consider Tri-City to be an entity separate from Donald Ford, and Donald Ford makes no claim on appeal that Tri-City would have any right to the property at issue that he would not.

United States v. Ford, —- F.3d —-, Nos. 97-6097, 97-6270, 97-6271, 1999 WL 528933 (6th Cir. July 23, 1999). [8]

On October 8, 1997, the government moved for summary judgment in the instant action. On January 7, 1998, the district court granted summary judgment to the government. A final order of forfeiture was entered on January 27, 1998. The bingo hall and RVA Hall were sold at auction on May 29, 1998 for $1,250,000 and $325,000, respectively.

Claimants now appeal.

II.

The district court granted summary judgment to the government. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In this respect, the moving party need not support its motion with affidavits or other similar materials "negating" the opponent's claim, but need only show that "there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Once the moving party has met its burden of production the nonmoving party must by deposition, answers to interrogatories, and admissions on file show specific facts that reveal a genuine issue for trial. *Id.* at 324. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252

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[8] In *Ford*, this court upheld Ford's convictions related to the illegal gambling enterprise but reversed his convictions for several tax offenses, completely unrelated to the bingo operation, which were imposed after a separate trial. We specifically held that the gambling and money laundering documents seized by the police were properly admitted at his trial for crimes related to the operation of the illegal bingo gambling operation. *See Ford*, 1999 WL 528933 at *8-9.

(1986). Thus, we must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 251-52.

A. Constitutionality of burden-shifting

Ford's first argument on appeal is that the federal statute that places "the burden of proof on the property owner in a civil forfeiture case under 19 U.S.C. § 1615 violates due process." Appellant Donald Ford's Brief at 8. The burden of proof in civil gambling forfeiture cases such as this is set forth in 19 U.S.C. § 1615. *See* 18 U.S.C. §§ 981(d) and 1955(d). In pertinent part, 19 U.S.C. § 1615 states:

> In all suits or actions . . . brought for [] forfeiture . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant . . . . Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court. . . .

Therefore, once the government has met its burden of showing probable cause to institute the forfeiture action, the burden then shifts to the claimant to show by a preponderance of the evidence that the property was not subject to forfeiture. *United States v. $22,287.00 in United States Currency*, 709 F.2d 442, 446 (6th Cir. 1983). "The probable cause which the government must show is a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *Id.* at 446-47 (quotation marks omitted).

It has been standard practice in this circuit to place on claimants the evidentiary burden to show by a preponderance of the evidence that forfeiture is not warranted. *See, e.g., United States v. 429 South Main Street*, 52 F.3d 1416, 1418 (6th Cir. 1995); *United States v. Rural Route 1, Box 137-B, Cutler, Ohio*, 24 F.3d 845, 848 1994 (6th Cir. 1994); *$22,287.00 in United States Currency*, 709 F.2d at 446. Claimants, however, contend that the fairly recent Supreme Court cases of *Austin v. United States*, 509

U.S. 602 (1993), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), evidence a trend towards "suggest[ing] that the burden of proof provision is unconstitutional." Appellant Donald Ford's Brief at 13. In *Austin*, the Court held that civil forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) was a monetary punishment subject to the limitations of the Eighth Amendment's Excessive Fines Clause. *See Austin*, 509 U.S. at 622. In so holding, the Court did not base its analysis on characterizing forfeiture as criminal or quasi-criminal, but instead held that the Excessive Fines Clause covered "punishments." *See id.* at 610. In *Good Real Property*, the Court held that, absent exigent circumstances, the Due Process Clause required notice and a meaningful opportunity to be heard before the Government seized real property under forfeiture statutes. *See Good Real Property*, 510 U.S. at 62.

However, in the more recent case of *United States v. Ursery*, 518 U.S. 267 (1996), the Court refused to extend *Austin's* "punishment" rationale to bring forfeiture under the Double Jeopardy Clause. Significantly, the Court declared that "nothing in . . . *Austin* purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause." *Id.* at 287. The Court also cautioned that "[t]he holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment . . . ." *Id.* at 288. Most importantly, the Court held that "there is little doubt that *Congress intended these forfeitures [under 18 U.S.C. § 981] to be civil proceedings*," *id.* at 289 (emphasis added), and that "there is little evidence . . . suggesting that forfeiture proceedings under . . . 18 U.S.C. § 981(a)(1)(A), *are so punitive in form and effect as to render them criminal* despite Congress' intent to the contrary." *Id.* at 290 (emphasis added).

Claimants urge that "[t]his Court should not be afraid to take the lead on this vitally important issue." Appellant Donald Ford's Reply Brief at 7. However, as the Ninth Circuit recently observed, the fact that "the Supreme Court has emphasized the civil nature of forfeitures" and has "indicated

its intention to limit *Austin* and *Good Real Property* to their facts" militates in favor of holding that claimants in gambling forfeiture cases are not entitled to hold the government to a burden of proof similar to that in criminal prosecutions. *See United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 494 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1399 (1998). Therefore, consistent with our prior precedent, we hold that the shifting burden of proof applied to forfeitures of property used in illegal gambling or money laundering operations does not violate the Due Process Clause.

B. Summary judgment on the RVA Hall

The government claims that it has probable cause for the forfeiture of the RVA Hall under both 18 U.S.C. §§ 1955 and 1957. It is not necessary for this court to determine whether the government has probable cause to take possession under § 1955, [9] because it clearly does have it under § 1957, a money laundering statute prohibiting monetary transactions in criminally-derived property that is of a value greater than $10,000.

18 U.S.C. § 981(a)(1)(A) states that "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section . . . 1957 of this title" is subject to forfeiture. The RVA Hall was clearly "involved in" a violation of § 1957, since the purchase of the hall was engineered as a way to launder money. Ford bought the hall for $144,000. One week later, the RVA "purchased" the RVA Hall for $375,000. The contract for the sale of the property reveals that RVA Post #1 paid Ford $75,000 in cash on the contract's execution date, with the balance ($300,000) to be paid in monthly installments through March 1997. On July 14, 1992, RVA Post #1 paid Ford $19,122 towards this balance due.

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[9] Under § 1955, the government may take possession of property "used in" an illegal gambling business. *See* 18 U.S.C. § 1955(d). The district court held that, even though it was "never the site of illegal activity," the RVA Hall was so "used" because "gambling is the reason that Mr. Ford built the RVA Hall."

The purchase of the hall was used simply as a way to launder some of the gambling proceeds. Ford would "pay" the RVA gambling proceeds, which the RVA would "use" to repay the money "owed" on the purchase contract. Claimants assert that "the sole basis for the government's allegation that the RVA Hall is forfeitable . . . is the fact that . . . the RVA conveyed $19122.33 to Ford by a check drawn on the RVA bank account." Appellant Donald Ford's Brief at 24-25. What claimants ignore, however, is that this check was being issued to Ford *under the "cover" of the purchase contract for the RVA Hall.* The RVA Hall was therefore being used as a "laundering device," and thus was clearly "involved in" a "monetary transaction in criminally-derived property that is of a value greater than $10,000" under § 1957.

Claimants also contend that the government should be collaterally estopped from seeking civil forfeiture of the RVA Hall because the jury found that the hall should not be forfeited. However, the special verdict form only asked the jury if the RVA Hall should be forfeited to the government pursuant to Count 34 of the indictment (alleging *only* a violation of § 1956, a different money laundering statute). Therefore, the government is not collaterally estopped from contending that the hall is subject to civil forfeiture under § 1957, since this issue was not litigated in the criminal action. Although the claimants believe that "the government had a full and fair opportunity to get a jury forfeiture verdict [under] § 1957," this observation ignores the fact that the civil forfeiture complaint was filed *before* the criminal action. Claimants cite no authority for the proposition that the government *must* seek criminal forfeiture of a piece of property, even if it has a pending, previously-filed civil action seeking civil forfeiture of said property.

Therefore, since the government had probable cause to seek forfeiture, and claimants have offered no evidence to show that the property was not subject to forfeiture, summary judgment on the RVA Hall was proper.

C. Summary judgment on the $175,000 in the Bardstown Road safety deposit box

The government claims that it has probable cause for the forfeiture of the RVA Hall under 18 U.S.C. § 1955. Claimants do not appear to contest the government's contention that it had probable cause to seize the $175,000 found in the Bardstown Road safety deposit box on the ground that it was "used" in violation of § 1955. They instead claim that they have brought forth evidence opposing that probable cause that raises an issue of material fact as to whether this money was "used" in the illegal gambling operation. First, they assert that the money was derived from concession stand operations at the bingo hall. The problem with this claim is that, even if it was true, the money would still have been "used" in the operation. As the district judge pointed out, "The concession stand was an important and expected part of the bingo scene. Without it, drawing and keeping patrons at the bingo hall would be extremely difficult." Moreover, the only evidence claimants offered to show that this money was, indeed, from concession operations was apparently provided by the government's accountant, who testified that the concession stand generated $290,000 in revenue that was not deposited into bank accounts. This sole piece of testimony, which does not come close to establishing that such concession revenues were the source of the $175,000 found in the safety deposit box, would not enable a reasonable jury to find, by a preponderance of the evidence, that the money was not subject to forfeiture.

Second, claimants allege that the $175,000 was a pre-existing cash hoard. The only evidence that claimants offer in support of this proposition is a witness's testimony indicating that Donald Ford was a wealthy man before he was involved in bingo and often engaged in high-stakes gambling. Needless to say, this sole piece of testimony, which also does not come close to establishing the source of the $175,000 found in the safety deposit box, also would not enable a reasonable jury to find, by a preponderance of the evidence, that the money was not subject to forfeiture.

Therefore, since the government had probable cause to seek forfeiture, and claimants have not offered evidence that would enable a reasonable jury to find that the money was not subject to forfeiture, summary judgment on the $175,000 in the Bardstown Road safety deposit box was proper.

D. Excessive fine

Claimants also assert that the forfeitures questioned in this case violate the Excessive Fines Clause of the Eighth Amendment. The court below did not reach this issue, although Donald Ford did raise it in his memorandum in opposition to summary judgment.

While this case was pending on appeal, the Supreme Court handed down its opinion in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028 (1998). In *Bajakajian*, the Court refined the standard used for determining whether a forfeiture constitutes an excessive fine under the Eighth Amendment. The court explained that forfeitures are "fines" subject to Eighth Amendment excessiveness protection if they constitute "punishment for an offense." 118 S. Ct. at 2033. If a forfeiture is found to be punitive, it "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 2036. The *Bajakajian* Court did not establish a standard for determining whether or not a forfeiture constitutes "punishment." However, the Court has held in *Austin v. United States*, 509 U.S. 602, 622 (1993), that civil in rem drug forfeitures under 18 U.S.C. § 881(a)(7) are subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

This court need not determine whether the forfeitures in this case constitute "punishment" because, even assuming *arguendo* that they do, it cannot be said that they are grossly disproportional to the gravity of Ford's offense. The $175,000 in the safety deposit box that was forfeited clearly appears to constitute, for the reasons stated earlier, proceeds obtained from an illegal gambling operation. Ford has not introduced any evidence that casts doubt on the proposition that he would not have obtained this money were it not for his bingo hall.

It also cannot be said that the forfeiture of the RVA Hall was grossly disproportional to the gravity of Ford's offense. Ford appears to have bought the hall solely as a "cover" for his illegal gaming operation. He paid $144,000 for the hall; $75,000 of this money was "paid back" to Ford by the RVA within a week of the purchase of the hall, another $19,112 was "paid back" shortly thereafter, and he had a contract with RVA Post #1 to cover up a lot more of his illegal gambling revenue. The RVA's only source of income appears to have been the proceeds obtained from illegal bingo gambling.

Therefore, from the outset of Ford's criminal enterprise, he had only $49,884 of his own money "invested" in the RVA Hall. Since most ($94,112) of the hall's purchase price was effectively funded using the proceeds from illegal gaming activity, it cannot be said that the forfeiture of the hall was in any way grossly disproportional to the gravity of his offenses, especially considering that Ford was originally sentenced to pay a $500,000 fine in the related criminal action. [10]

E. Margaret Ford's standing

The district court correctly held that Margaret Ford did not have standing to claim the property at issue in this case. In paragraph 11 of the Ford's divorce-related property settlement agreement, Margaret Ford conveyed to her ex-husband "all right title, interest, and claim in and to any other real or personal property located or situated in any place or state," including "2902 South Seventh Street," which was the address for the RVA Hall. The money in the Bardstown Road safety deposit box would clearly, under the agreement, fall under the "any other . . . personal property" provision in Paragraph 11, since the money is not referred to elsewhere in the agreement.

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[10] This sentence has been vacated and the criminal action remanded for resentencing, because this court vacated several of Ford's tax convictions (unrelated to his illegal gambling operation) that were used to determine Ford's criminal history category in his sentencing on the gambling-related convictions. *See United States v. Ford*, —- F.3d —-, Nos. 97-6097, 97-6270, 97-6271, 1999 WL 528933 (6th Cir. July 23, 1999).

Simply put, Margaret Ford has no colorable interest of any kind in the property that is the subject of this litigation. In a forfeiture proceeding of this type, a claimant must have a colorable ownership, possessory or security interest in at least a portion of the defendant property. *United States v. $515,060.42 in United States Currency*, 152 F.3d 491, 497 (6th Cir. 1998). This requirement exists in part out of a common concern for "straw man" transfers of property from criminal defendants to third parties and subsequent assertions of ownership by claimants who lack a legal interest in the property subject to forfeiture. *See id.* at 498. Margaret Ford appears to be such a "straw man." In the divorce settlement, she agreed to pursue a claim in this case and, if successful, turn the property she recovered over to Donald Ford.

III

The district court's grant of summary judgment is AFFIRMED in all respects.

CLAY, Circuit Judge, dissenting. Because I believe that the allocation of the burden of proof in a civil forfeiture case under 19 U.S.C. § 1615 violates the Due Process Clause of the Fifth Amendment, I respectfully dissent. Section 1615 provides in pertinent part:

> In all suits or actions . . . brought for [] forfeiture . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant . . .; Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged by the court. . . .

19 U.S.C. § 1615. Once the government shows probable cause to believe that the property is subject to forfeiture, the burden then shifts to the claimant to prove by a preponderance of the evidence that the property is *not* subject to forfeiture. *See, e.g., United States v. Real Property Known and Numbered as 429 South Main Street, New Lexington, Ohio*, 52 F.3d 1416 (6th Cir. 1995). If

a claimant fails to meet his burden of proof following the government's initial showing of probable cause, his property is lost.

I believe that this allocation of the burden of proof in the quasi-criminal setting of a civil forfeiture proceeding violates the Fifth Amendment's protection against loss of property without due process of law. In my view, due process requires that the government establish at minimum that forfeiture is supported by a preponderance of the evidence – a typical burden in civil proceedings – before the burden of proof may shift to the claimant to demonstrate that he is entitled to keep his property.

This Court has expressly recognized the "quasi-criminal" aspects of civil forfeiture proceedings. For example, in *United States v. Real Property Known and Numbered as Rural Route 1*, 24 F.3d 845, 851 (6th Cir. 1994), this Court rejected the government's argument that an adverse inference could be drawn from a claimant's failure to testify on self-incrimination grounds at a civil forfeiture proceeding. Although the Supreme Court had held that such inferences were generally permissible in civil cases, this Court carved out an exception for forfeiture cases because of their quasi-criminal nature:

> The government's attempt to equate forfeiture proceedings with ordinary civil proceedings is misguided. The Supreme Court recently reviewed the history of civil forfeiture proceedings and found them to be a form of punishment subject to the limitations of the Eighth Amendment's Excessive Fines Clause. Similarly, this court previously observed that "the forfeiture penalty is closely related to a criminal sanction[.]" These cases undercut the government's contention that we should review this forfeiture proceeding in the same light as we would review a traditional civil proceeding."

Id. at 851 (citations omitted). *See also United States v. $53,082 in United States Currency*, 985 F.2d 245, 250 (6th Cir. 1993) (stating

that "the exclusionary rule applies to a forfeiture proceeding because of its quasi-criminal nature"). It is thus insufficient to note simply that forfeiture proceedings do not require the identical constitutional protections afforded to full-fledged criminal proceedings. Instead, this Court has long recognized that, even if forfeiture proceedings do not warrant the full constitutional protections available in strictly "criminal" proceedings, their quasi-criminal nature warrants constitutional safeguards of a high order. *See also Addington v. Texas*, 441 U.S. 418, 424 (1979) (stating that a "clear and convincing" standard of proof is often required in cases involving allegations of "some quasi-criminal wrongdoing by the defendant" because "the interests at stake . . . are deemed to be more substantial than mere loss of money").

Against this backdrop, the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), is particularly significant. There the Court held that, except in the most exigent circumstances, due process requires that the government afford the record owner notice and an opportunity to be heard before the seizing property for forfeiture. The Court thus made clear that claimants in civil forfeiture proceedings are entitled to protection under the Due Process Clause. Indeed, the Court's *Good Real Property* decision, together with its opinion in *Austin v. United States*, 509 U.S. 602 (1993) (holding that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture proceedings because such proceedings are punitive in nature), has led the Second Circuit to question whether the government's initial burden of mere "probable cause" affords the claimant sufficient due process protections:

> *Good* and *Austin* reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant *in rem* allowing seizure — probable cause — suffices to meet the requirements of due process . . . . Independent of this question, we also note that it is an open issue "whether the due process clause requires the government to sustain a

> burden falling between the extremes of probable cause and proof beyond a reasonable doubt" before a seizure is made and a claimant is put to proof of the innocent owner defense.

United States v. One Parcel of Property Located at 194 Quaker Farms Road, 85 F.3d 985, 990-91 (2d Cir. 1996).

I believe that due process requires the government to show more than mere "probable cause" before placing an individual's property at risk of forfeiture. Unlike standard civil proceedings, allegations of criminal wrongdoing lie at root of the forfeiture proceedings at issue here; only property connected to criminal misconduct may be confiscated by the government. Moreover, claimants in forfeiture proceedings often risk not just the loss of cash, but of real and personal property that may be difficult or even impossible to replace. In *Good*, the Supreme Count concluded that because rights in real property are so central in society, and because protection of due process is critical where real property may be lost, the government has an affirmative obligation to protect the claimant's interests in the forfeiture context. *Good*, 510 U.S. at 53-62. As one Ninth Circuit panel noted:

> Finally, we observe that allowing the government to forfeit property based on a mere showing of probable cause is a "constitutional anomaly." . . . As the Supreme Court has explained, burdens of proof are intended in part to "indicate the relative importance attached to the ultimate decision." . . . The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of property, from their hard-earned money, to their sole means of transport, to their homes. We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause.

United States v. $49,576 in United States Currency, 116 F.3d 425, 429 (1997) (citations omitted).

Under the current statutory scheme, a claimant may be deprived of his property based upon the government's mere showing of probable cause even if he adduces an equal amount of evidence *against* forfeiture as the government does *for* forfeiture. This is one of the primary reasons I am unpersuaded by the Ninth Circuit's subsequent opinion in *United States v. $129,727 in United States Currency*, 129 F.3d 486 (1997), *cert. denied*, 118 S. Ct. 1399 (1998) upon which the majority here relies. There a separate Ninth Circuit panel rejected the claimant's argument that, because civil forfeitures are punitive and "quasi-criminal," due process requires the government to prove its case by a preponderance of the evidence at the outset of the proceedings, rather than showing only probable cause to believe that forfeiture is warranted. The court maintained that even if the government meets its initial burden of probable cause for forfeiture, the claimant can defeat forfeiture by establishing that it is "more likely than not" that the property should *not* be forfeited. In such a case, "the Government must then offer enough probative admissible evidence to contest the claimant's proof. . . . Under the preponderance standard, the Government must at least equal the claimant's proof with admissible evidence to prevail in the forfeiture action. . . . Only where . . . the claimant offers no evidence [in opposition to forfeiture] can the Government obtain a judgment of forfeiture on its preliminary showing of probable cause." *Id.* at 492.

This is simply incorrect. Under the current statutory scheme, once the government makes a showing of probable cause, the burden shifts to the claimant to prove by a *higher* standard of evidence — a preponderance — that forfeiture is not required. If the claimant sets forth evidence only equal to the government's — that is, probable cause to believe that forfeiture is not warranted — the government prevails and the property is lost. In such an instance, the government need not prove its case by a preponderance of the evidence, even though the claimant has set forth as much evidence in opposition to forfeiture as the government has in support of forfeiture. I believe that such a scheme violates due process given the

severity of the ensuing loss. *See Santosky v. Kremer*, 455 U.S. 745, 758 (1982) (stating that "[w]hether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss").

Finally, I note that the typical claimant is at a severe litigation disadvantage during the course of a forfeiture proceeding. The typical claimant is often incarcerated while the civil forfeiture action is pending and generally cannot afford to aggressively contest the forfeiture. *See* 1 PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 11.03[9], 11.36 to 11.36.1 "The high cost of retaining counsel and investigators (and posting a cost bond) makes it uneconomical to fight most civil forfeitures because the value of the property is generally less than the cost of the litigation." *Id.*

Given the quasi-criminal nature of forfeiture proceedings, the severity of the claimant's loss, and the practical difficulties of contesting such an action, I conclude that it offends due process to allow the government to initiate – and, in many cases prevail in – a forfeiture action based solely upon a showing of probable cause. It is thus my view that 19 U.S.C. § 1615 violates the Due Process Clause of the Fifth Amendment because it allows forfeiture proceedings to commence without any showing that, at a minimum, forfeiture is warranted by a preponderance of the evidence. For the reasons set forth above, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action no. 3:93CV-196-H

UNITED STATES OF AMERICA, *Plaintiff*

v.

FOUR (4) CONTIGUOUS PARCELS OF
REAL PROPERTY SITUATED IN LOUISVILLE,
JEFFERSON COUNTY, KENTUCKY,
GENERALLY KNOWN AND DESIGNED AS
2901 S. SEVENTH STREET ROAD
2915 S. SEVENTH STREET ROAD,
1600 ARCADE AVENUE, AND
1530 ARCADE AVENUE, TOGETHER WITH
ALL BUILDINGS, IMPROVEMENTS AND
APPURTENANCES, THEREON, ET AL., *Defendants*

[ENTERED January 7, 1998]

MEMORANDUM OPINION

United States has moved for summary judgment declaring that the real property named as Defendants in this action and Lots 1 and 2 of the personalty named as Defendants should be forfeited to the United States. Both Don Ford and his former wife, Margaret Ford, have opposed the motion. [1]

The real property consists of the Arcade Plaza Bingo Hall, situated on three parcels of land at 2901 South Seventh Street Road, 2915 South Seventh Street Road and 1600 Arcade

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[1] No one disputes that Don Ford has legal standing to contest the forfeiture. The United States argues strenuously that Margaret Ford lacks standing. Mrs. Ford makes the same arguments as Don Ford, except that she claims standing to assert the "innocent owner" defense. The Court will address those issues in Section IV of this Memorandum Opinion.

Avenue; a residence at 1530 Arcade Avenue, which is contiguous with the Bingo Hall property; and the Regular Veterans Association ("RVA") Hall, located at 2902 South Seventh Street Road. The personalty consists of Lot 1, which is currency totaling $53,753.05 seized on August 28, 1992, at the Arcade Plaza Bingo Hall and Lot 2 consisting of currency totaling $175,500 seized on August 31, 1992, from a safe deposit box at the Bank of Louisville Branch on Bardstown Road.

I.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). A moving party is entitled to summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

In the context of a civil forfeiture action brought pursuant to 21 U.S.C. § 881, the government has the initial burden of showing probable cause to institute the forfeiture action. *United States v. $22,287.00*, 709 F.2d 442, 446 (6th Cir. 1983). The probable cause which the government must show is "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *Id.* at 446-47 (quoting *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980)). Once the government has met its burden, the burden then shifts to the claimant to show by a preponderance of the evidence that the property was not subject to forfeiture. *Id.* at 446.

Some courts have fairly criticized the standard of proof as being difficult to understand and as imposing too slight a burden on the United States. However, neither the Sixth

Circuit nor the United States Supreme Court has adopted Mr. Ford's contentions that the United States must show clear and convincing proof and not rely upon hearsay testimony in order to establish probable cause. The United States Supreme Court has stated that a civil forfeiture may amount to punishment, but it has not found that civil forfeiture proceedings are in fact criminal proceedings. Furthermore, the Supreme Court has not reconsidered the established burden of proof. *See United States v. Ursery*, 116 S.Ct. 2135 (1996) (holding that in rem civil forfeitures are neither punishment nor criminal for the purposes of the Double Jeopardy Clause); *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that civil forfeitures are punishment for the purposes of the Eighth Amendment's Excessive Fines Clause). Consequently, this Court concludes that the Supreme Court has not undermined the Sixth Circuit law establishing the burden of proof. The United States need not prove its case by clear and convincing evidence in order to obtain summary judgment.

As it now stands, the United States must first show probable cause by preponderance of the evidence, then claimants must show, also by preponderance, that the property was not subject to forfeiture. If unrebutted, a showing of probable cause alone can support a forfeiture. *United States v. 318 South Third St.*, 988 F.2d 822, 825 (8th Cir. 1993). While one may certainly question the legitimacy of the shifting burden procedure, cases after *Austin* continue to place this evidentiary burden upon claimants. *See United States v. 429 South Main Street*, 52 F.3d 1416 (6th Cir. 1995); *United States v. Real Property Titled in the Names of Godfrey Soon Bong Kang*, 120 F.3d 947 (9th Cir. 1997). [2]

II.

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[2] Don and Margaret Ford each make a number of arguments which Judge Simpson previously considered in the course of the criminal trial. The Court will not reconsider those rulings now.

Mr. Ford can raise no factual issues to oppose forfeiture of 2901 and 2915 South Seventh Street and 1600 Arcade Avenue for the reason that the illegal gambling actually occurred at those locations. However, Mr. Ford argues that 1530 Arcade Avenue ("the residence") and 2902 South Seventh Street ("the RVA Hall") were not used for illegal gambling. While this appears to be true, it does not decide the issue of forfeiture.

From all the evidence in the case, the United States has clearly shown probable cause that the RVA Hall was involved in the gambling enterprise. As the government suggests, gambling is the reason that Mr. Ford built the RVA Hall. The jury in the criminal case clearly found that he conducted an illegal gambling operation from the adjacent premises. The RVA supposedly sponsored most of those illegal gambling events. No one seriously disputes that Mr. Ford completely controlled the RVA. Without the existence of the RVA and its supposed legitimacy, Mr. Ford would have no basis whatsoever for claiming that the bingo operations were legal. All the evidence seems to agree with the United States' assertion that the RVA and the RVA Hall had no existence apart from the role they played in the illegal gambling operation. Under other circumstances, the fact that the RVA Hall was never the site of illegal activity could be decisive. However, in these circumstances it makes no difference because the RVA and the RVA Hall were central to the entire illegal gambling operation. As the criminal jury concluded by the totality of its verdicts, the evidence clearly and convincingly proves that the property was used as and in connection with an illegal gambling operation. Consequently, it is subject to forfeiture.

Mr. Ford also argues that the United States is estopped from forfeiture of the RVA Hall because the jury in the criminal case declined to find the RVA Hall forfeitable under Count 34 of the indictment. As the United States points out, this argument simply ignores the evidence that the RVA Hall was an essential part of the other money laundering offenses for which Mr. Ford was convicted. Several of the money

laundering counts constituted payments by the RVA for the purchase of the RVA Hall. By convicting Ford for violations of 18 U.S.C. § 1957 stemming from RVA payments for the RVA Hall, the jury seems to have concluded clearly that the RVA Hall was involved in violations of 18 U.S.C. § 1983. Consequently, the jury's finding as to Count 34 of the indictment does not preclude summary judgment and forfeiture.

The forfeiture analysis as to 1530 Arcade Avenue is somewhat less clear. Apparently, Mr. Ford does not dispute that Mr. Bollinger lived there rent free. During the same time he helped manage the illegal gambling operations. [3] This connection alone could support forfeiture. The property may have been used for parking at some of the bingo events. Based on the evidence of record, a reasonable jury would likely find that the property at 1530 Arcade Avenue was used in connection with illegal gambling operations. However, that is not the question. The question is whether reasonable minds could differ, and the Court concludes a reasonable jury could find the residence only incidental to the illegal gambling. Therefore, summary judgment seems inappropriate.

III.

Mr. Ford's primary argument opposing forfeiture of the cash is that those funds were derived from either concession stand operations or from his cash hoard existing prior to the illegal gambling. The evidence at the criminal trial established beyond doubt that Mr. Ford engaged in extensive illegal gambling operation with the RVA at its center. Without the illegal gambling operation, the concession stand would not have existed. The concession stand was an important and expected part of the entire bingo scene. Without it, drawing and keeping patrons at the bingo would have been extremely difficult. In these circumstances, the concession stand

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[3] That Mr. Ford may have contemplated using the property for his bingo operation is irrelevant.

realistically cannot be separated from the illegal gambling operations. Mr. Ford offers no facts to support his position that the gambling and the concession stands are independent operations. In fact, the clear evidence is that he controlled the entire setup and all its component parts. The testimony at trial strongly suggests that the fund in both lots of cash derived from bingo operations. Other explanations for the cash are possible. Mr. Ford would certainly have evidence of those other explanations if they were true. He has put forth no evidence supporting any other explanation. Consequently, funds derived from the concession stand, including those found in cash Lots 1 and 3, are subject to forfeiture.

IV.

Margaret Ford asserts that she has standing to challenge the forfeiture and makes all the same arguments as Mr. Ford, as well as asserting "an innocent owner" defense on her own behalf. The Court will not consider again those arguments which are identical to those of Mr. Ford for they apply with equal force to Mrs. Ford. The Court will consider separately her other claims.

Mrs. Ford claims a legal and equitable interest in the property subject to this lawsuit based upon her marital interest. She has asserted no other facts establishing any interest in the property other than whatever "legal title" might be attributable to that marital interest. Furthermore, as part of the divorce settlement, Mrs. Ford executed a quitclaim to Mr. Ford of any real and personal property which is subject to this litigation. She agreed to continue as a claimant in this litigation, and if she prevails in any way she will convey her interest in that property back to Mr. Ford. Thus, at this time Mrs. Ford's interest is less than it was when the forfeiture commenced. Whether Mrs. Ford's standing should be evaluated based on her interest now or when the forfeiture commenced need not be decided since even her 'marital interest' does not give her standing.

In forfeiture actions, one's ownership of property is determined by state law. *See United States v. Smith*, 966 F.2d 1045, 1054 (6th Cir. 1992). Under Kentucky law, for the purposes of dissolution, "'marital property' means all property acquired by either spouse subsequent to the marriage." KRS 403.190(2). At dissolution, property acquired by a spouse after marriage is presumed to be marital property. KRS 403.190(3). Note that the concept of 'marital property' only becomes relevant at divorce or legal separation. During the marriage, each spouse can acquire and own property separate from the other spouse. *See e.g.* KRS 404.010 (specifically delineating a wife's right to acquire and own property separate from her husband during the marriage). Therefore, a claim that the property is marital property, without other indicia of ownership, may not give a spouse standing to challenge a forfeiture.

The Sixth Circuit has held that bare legal title by one who does not exercise dominion or control over property may not be sufficient to establish standing to challenge a forfeiture. *United States v. 526 Liscum Dr.*, 866 F.2d 213, 217 (6th Cir. 1988). In that case, a drug dealer's daughter held title to a house which her father used for the drug offenses. The daughter did not use the property nor was there evidence that she paid for it. In a variety of circumstances, other circuits have imposed the same principle. *See United States v. 900 Rio Vista Blvd.* 803 F.2d 625, 630 (11th Cir. 1986) and *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979). The intent behind the forfeiture provision of the Control Substance Act is to deprive criminals of the tools used to conduct their illegal activities. A failure to look beyond bare legal title would foster manipulation of nominal ownership and frustrate this intent.

At the time this action was filed Mrs. Ford had less than bare legal title. Her claim to the property rests on the fact that she was married to Mr. Ford when he purchased the property. She was not the title holder, nor did she exercise any control over or use of the property, which could enhance her interest. She retained only the marital interest. Since the initial filing,

even Mrs. Ford's tenuous marital interest has been significantly compromised by her divorce and property settlement with Mr. Ford. She seems now to have neither a bare legal title nor a marital interest.

Furthermore, even if Mrs. Ford had retained a marital interest, she would not have standing to contest the forfeiture. A number of cases have discussed whether property owned jointly by spouses was subject to civil or criminal forfeiture. These cases seem to establish that where a spouse establishes an actual legal interest in the property, she will have standing particularly where the property is her residence. *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (concerning vested undivided community property interests); *United States v. 116 Emerson St.*, 942 F.2d 74 (1st Cir. 1991) (concerning 50 percent joint interest); *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990) (concerning tenancy by the entirety); and *United States v. Jimerson*, 5 F.3d 1453 (11th Cir. 1993) (concerning a family residence owned jointly as tenants by the entirety). The innocent owner may establish actual ownership by operation of state law in a community property jurisdiction or by operation of the property deed.

An interest in marital property is not the same as an actual ownership interest. In *United States v. 717 South Woodward St.*, 2 F.3d 529 (1993), the Third Circuit considered whether a wife could assert an innocent owner defense to prevent the forfeiture of "marital property." [4] The property was purchased during the marriage, but the husband was the sole record owner. Pennsylvania law, which seems similar to Kentucky law, provides that "as used in this chapter, 'marital property' means all property acquired by either party during the marriage.'" *Id.* at 535. The purpose of this section, like the Kentucky section, is to designate which property will be subject to division upon dissolution. The Third Circuit held that this

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[4] The requirements for constitutional standing and 'ownership' under the innocent owner defense are essentially the same. See *United States v. 717 South Woodward St.*, 2 F.3d 529, 535 n.3 (3d Cir. 1993).

provision merely requires equitable distribution of property upon dissolution, and when there is no dissolution, it does not confer ownership status on one spouse in the other spouse's property. *See id.* at 535-36. Therefore, the wife could not assert the innocent owner defense. Other courts have reached similar conclusions based on comparable statutes. *See United States v. Schifferli,* 895 F.2d 987 (4th Cir. 1990) (where the wife deeded her interest in the property to the husband but still asserted her standing to contest the forfeiture. The court held that, under South Carolina law, marital property does not exist until the commencement of marital litigation, so the wife had no interest in the property and therefore no standing). Given Kentucky's statutory construction and its similarity to both Pennsylvania and South Carolina law, the same principles can be applied in this case.

Once the government has met its burden of showing probable cause to institute a forfeiture, the burden shifts to the claimant to show that the property is not subject to forfeiture. As it applies to Mrs. Ford, that burden requires that she produce evidence establishing her standing under the statute to contest the forfeiture. Mrs. Ford has provided no evidence that she has any interest in the property other than that by virtue of her marriage to Mr. Ford, which no longer exists. And in Kentucky, a marital interest only confers the right to an equitable distribution upon divorce, not ownership. Moreover, she has given any rights she may have retained in the property to Mr. Ford. Because Mrs. Ford's interest in these properties is even less than bare legal title, the Court concludes that she does not have standing to raise defenses to forfeiture in her own name. The Court, therefore, need not consider the "innocent owner" defense.

The Court will enter a separate order consistent with this Memorandum Opinion.

/S/
JOHN G. HEYBURN II

JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:93CV-196-H

UNITED STATES OF AMERICA, *Plaintiff*

v.

FOUR (4) CONTIGUOUS PARCELS OF
REAL PROPERTY SITUATED IN LOUISVILLE,
JEFFERSON COUNTY, KENTUCKY,
GENERALLY KNOWN AND DESIGNED AS
2901 S. SEVENTH STREET ROAD
2915 S. SEVENTH STREET ROAD,
1600 ARCADE AVENUE, AND
1530 ARCADE AVENUE, TOGETHER WITH
ALL BUILDINGS, IMPROVEMENTS AND
APPURTENANCES, THEREON, et al., *Defendants*

[ENTERED January 7, 1998]

ORDER

The United States has moved for summary judgment pursuant to Fed.R.Civ.P. 56. The Court has considered the motion, and the responses thereto. The Court has issued a Memorandum Opinion and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the following real property described in the Verified Complaint: (1) 2901 South Seventh Street Road, (2) 2915 South Seventh Street Road; (3) 1600 Arcade Avenue; (4) 2902 South Seventh Street; and Lots 1 and 3 of United States currency described in the Verified Complaint, shall be and hereby are forfeited to the United States.

IT IS FURTHER ORDERED that the motion for summary judgment of the United States is DENIED as to the property known as 1530 Arcade Avenue.

IT IS FURTHER ORDERED that Margaret Ford's objection to the forfeiture is DENIED.

IT IS FURTHER ORDERED that all other pending motions are moot.

The Court will set a trial date in the near future to resolve the remaining forfeiture claim in this case.

This 6th day of January, 1998.

/S/
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-93-0196-L(H)

UNITED STATES OF AMERICA, *Plaintiff*

v.

FOUR (4) CONTIGUOUS PARCELS OF REAL PROPERTY SITUATED IN LOUISVILLE, JEFFERSON COUNTY, KENTUCKY, GENERALLY KNOWN AND DESIGNATED AS 2901 SOUTH SEVENTH STREET ROAD, 2915 SOUTH SEVENTH STREET ROAD, 1600 ARCADE AVENUE, AND 1530 ARCADE AVENUE, TOGETHER WITH ALL BUILDINGS, IMPROVEMENTS AND APPURTENANCES THEREON
And
ONE (1) PARCEL OF REAL PROPERTY SITUATED IN SHIVELY, JEFFERSON COUNTY, KENTUCKY, GENERALLY KNOWN AND DESIGNATED AS 2902 SOUTH SEVENTH STREET ROAD, TOGETHER WITH ALL BUILDINGS, IMPROVEMENTS AND APPURTENANCES THEREON, *Defendants*
AND
SIX (6) LOTS OF UNITED STATES CURRENCY AND COIN TOTALING $266,178.05, *Defendants*

[ENTERED January 28, 1998]

FINAL DECREE AND ORDER OF FORFEITURE

This action having brought before the Court on the United States' motion for Summary Judgment, and the Court having reviewed the entire record herein and finding that notice of the

arrest of the defendant property was published in The Louisville Courier Journal on April 30, May 7 and May 14, 1993, directing any persons having or claiming to have any right, title or interest in said defendant property to file a claim with the Clerk of the Court within 10 days after the date of the notice and to serve their answers to the Complaint within 20 days after the filing of their claims; and finding that more than 10 days have elapsed since the date of the last publication of said notice, that the time within which claims may be filed has not been extended and that no person or entities have filed a claim to the defendant properties other than Donald G. Ford, RVA Post #1, RVA Post #2, RVA Post #3, RVA Post #4, RVA Post #6, Don Ford Cars, Inc., Tri-City Credit, Inc., and Arcade Plaza, Inc., (collectively, "the Donald G. Ford claimants") and Margaret Ford, and the Court having granted summary judgment in favor of the United States as against the Donald G. Ford claimants, finding that the United States is entitled to judgment of forfeiture as a matter of law as to certain real and personal property described more fully herein; and the Court having further granted summary judgment in favor of the United States as against claimant Margaret Ford, finding that she lacked sufficient right, title or interest in the property to maintain a claim; and the Court being in all other respects sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The following real property, together with all buildings, appurtenances, fixtures and improvements thereon, is HEREBY FORFEITED to the United States of America, and the United States Marshal shall take immediate possession of the real property, for disposition in accordance with law:

A. 2901 South Seventh Street Road, Louisville, Kentucky: BEGINNING at the intersection of the center line of the SEVENTH STREET ROAD with the extension of the Southwest line of Arcade Avenue, running thence with the center line of the Seventh Street Road South 29 degrees 15 minutes West 200 feet; thence South 29 degrees 59 minutes East 165.09 feet; thence

North 36 degrees East 188.14 feet to the Southwest line of Arcade Avenue thence with the Southwest line of Arcade Avenue North 29 degrees 59 minutes West 200 feet to the beginning, AND BEING the same property conveyed to Donald G. Ford and Margaret Ford, his wife, by Deed dated September 19, 1989, and recorded in Deed Book 5898, Page 956, in the Office of the Clerk of the County Court of Jefferson County, Kentucky; and

B. 2915 South Seventh Street Road, Louisville, Kentucky: BEING Tract 2 on Minor Subdivision Plat #147-71 which plat is attached to and made a part of Deed Book 4415, Page 307, in the Office of the Clerk of Jefferson County, Kentucky; being a parcel of land fronting on 7th Street Road, 234.70 feet, an irregular shaped lot, AND BEING the same property conveyed to Donald G. Ford and Margaret Ford, his wife, by Deed dated September 19, 1989, and recorded in Deed Book 5898, Page 992, in the Office of the Clerk of the County Court of Jefferson County, Kentucky; and

C. 1600 Arcade Avenue, Louisville, Kentucky: BEGINNING at a point in the Southwest line of Arcade Avenue at its intersection with the Northwesterly line of the tract conveyed to Allie B. Moore and wife by Deed dated January 4, 1982, recorded in Deed Book 5269 Page 163 in Jefferson County Clerk's Office; thence with the Southwest line of Arcade Avenue South 27 17' 20" East 292.57 feet to a corner of the tract conveyed to Haseker-Adair-Pierce, a Kentucky General Partnership by Deed dated June 25, 1983 recorded in Deed Book 5359 Page 48, in said Clerk's Office; thence with lines of the Haseker-Adair-Pierce tract South 62 42' 10" West 162 feet to a corner and South 27 17' 20" East 130 feet to another corner of said tract in the Southeast line the Moore tract as described in Deed Book 5269 Page 163 aforesaid; thence with the Southeast line of the Moore tract South 62 42' 10" West 11 5.45 feet to a corner of the Moore tract; thence with lines of the Moore tract North 27 17' 40" West 298.24 feet to a fence post corner to same and North 38 34' 02" East 304.08 feet to the beginning; being tract 1 on Minor Subdivision Plat # 107-83 attached to Deed

recorded in Deed Book 5359 Page 48, in said Office, AND BEING the same property conveyed to Donald G. Ford and Margaret Ford, his wife, by Deed dated September 15, 1989, and recorded in Deed Book 5898, Page 25, in the Office of the Clerk of the County Court of Jefferson County, Kentucky, and

D. 2902 South Seventh Street Road, Shively, Kentucky: BEGINNING at a point in the center line of 7th Street Road, at its intersection with the Southerly line of the right of way formerly known as Bohannons Lane; thence with the Southerly line of said right-of-way, also being the Northerly line of the tract conveyed to Charles O. Allen by deed dated January 21, 1938, of record in Deed Book 1662 Page 335, in the office of the Clerk of the County Court of Jefferson County, Kentucky, North 83 degrees West 330 feet to the Northwest corner of said last mentioned tract; thence with the Northwesterly line of same, South 20 degrees West 139 feet to the Southwesterly corner of said tract; said corner also being a corner of the tract conveyed to Charles O. Allen by deed dated October 17, 1938, of record in Deed Book 1939 Page 179, in the aforesaid Clerk's office; thence with the Southwesterly line of same, South 64 degrees 35 minutes East 306.40 feet, more or less, to the center line of 7th Street Road; thence with the center line of said road, North 24 degrees East 242.46 feet to the beginning, AND BEING the same property conveyed to Donald G. Ford and Margaret Ford, his wife, by Deed dated February 14, 1992, and recorded in Deed Book 6148, Page 398, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

2. Portions of the above-described real property are the subject of condemnation proceedings in Jefferson Circuit Court, in Civil Actions 97-CI-03137, 97-CI-03138, and 97-CI-03139. If and to the extent any money is payable as compensation for any portion of the above-described real property on account of those condemnation proceedings, it should be paid to the United States, inasmuch the United States' right, title and interest in the forfeited real property arose in 1992, before commencement of the condemnation proceedings, and any condemnation payment is attributable to the forfeited property.

3. Personalty, consisting of the following lots of currency, is HEREBY FORFEITED to the United States of America, for disposition in accordance with law:

Lot 1: $53,753.05 in United States currency and coin seized from the premises of Arcade Plaza Bingo, 2901 South Seventh Street Road, Louisville, Jefferson County, Kentucky; and

Lot 3: $175,500.00 in United States currency seized from Safe Deposit Box #76, at Bank of Louisville, Branch #R20, 4208 Bardstown Road, Louisville, Jefferson County, Kentucky.

This is a Final Judgment, and there is no just cause for delay.

This 27th day of January, 1998.

JOHN G. HEYBURN II, JUDGE

/S/
United States District Court

cc. Counsel of Record
United States Marshal

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-93-0196-L(H)

UNITED STATES OF AMERICA, *Plaintiff*

v.

FOUR (4) CONTIGUOUS PARCELS OF REAL PROPERTY SITUATED IN LOUISVILLE, JEFFERSON COUNTY, KENTUCKY, GENERALLY KNOWN AND DESIGNATED AS 2901 SOUTH SEVENTH STREET ROAD, 2915 SOUTH SEVENTH STREET ROAD, 1600 ARCADE AVENUE, AND 1530 ARCADE AVENUE, TOGETHER WITH ALL BUILDINGS, IMPROVEMENTS AND APPURTENANCES THEREON
AND
ONE (1) PARCEL OF REAL PROPERTY SITUATED IN SHIVELY, JEFFERSON COUNTY, KENTUCKY, GENERALLY KNOWN AND DESIGNATED AS 2902 SOUTH SEVENTH STREET ROAD, TOGETHER WITH ALL BUILDINGS, IMPROVEMENTS AND APPURTENANCES THEREON, et al., *Defendants*

[ENTERED January 28, 1998]

ORDER AND JUDGMENT DISMISSING

The United States having sought leave of Court, pursuant to Fed. R. Civ. P. 41(a)(2), to dismiss this action as to the following parcel of real property:

1530 Arcade Avenue, Louisville, Kentucky:

Beginning at a point in the Southwest line of Arcade Avenue at its intersection with Southeast line of land conveyed to Alexander Kotheimer and wife, dated September 30, 1947, of record in Deed Book 2292, Page 396, in the Office of the Clerk of Jefferson County, Kentucky; thence with the Southeast line of said tract South 60 degrees 01 minute 30 seconds West 281 feet to a stone; thence with the Southwest line of said tract North 30 degrees West 141.88 feet to its intersection with the Southeast line of 3A conveyed by Alexander Kotheimer and wife to Arcadia Realty Company, dated September 30, 1952, of record in Deed Book 2931 Page 207, in said Clerk's Office; thence with the Southeast line of said last mentioned tract North 60 degrees 01 minute 30 seconds East 281.04 feet to said Southwest line of Arcade Avenue; thence with said line of said Avenue South 29 degrees 59 minutes East 141.88 feet to the beginning.

AND BEING the same property conveyed to Donald G. Ford and Margaret Ford, his wife, by Deed dated October 30, 1989, and recorded in Deed Book 5910, Page 310, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

and the United States having further sought leave of Court, pursuant to Fed. R. Civ. P. 41(a)(2), to dismiss this action as to personalty consisting of the following currency:

Lot 2: $5,000.00 in United States currency seized from safe deposit box #593, at Bank of Louisville, Branch #9, 7803 Preston Highway, Louisville, Jefferson County, Kentucky

Lot 4: $15,000.00 in United States currency seized from Safe Deposit Box #435, at Bank of Louisville, Branch #31, 4808 U.S. Highway 42, Louisville, Jefferson County, Kentucky

Lot 5: $6,925.00 in United States currency seized from Safe Deposit Box #53, at Bank of Louisville, Branch #14, 3450 Taylor Boulevard, Louisville, Jefferson County, Kentucky

Lot 6: $10,000.00 in United States currency seized from Safe Deposit Box #323, at Stock Yards Bank and Trust Company, 214 South Fifth Street, Louisville, Jefferson County, Kentucky

and the Court having considered the motion, and being sufficiently advised, this civil action as to the above-described real and personal property SHALL BE AND HEREBY IS DISMISSED.

This 27th day of January, 1998.

JOHN G. HEYBURN II, JUDGE

/S/
United States District Court

cc: Counsel of Record

APPENDIX F

98-5292/5317

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

FOUR CONTIGUOUS PARCELS OF REAL PROPERTY SITUATED IN LOUISVILLE, JEFFERSON COUNTY, KENTUCKY, ET AL., *Defendants*

DONALD G. FORD; TRI-CITY CREDIT, INC.; MARGARET J. FORD, *Defendants-Appellants*

[FILED December 10, 1999]

ORDER

BEFORE: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active [1] judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the

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[1] Chief Judge Boyce F. Martin, Jr., recused himself from participation in this ruling.

cases. Accordingly, the petitions are denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/S/

Leonard Green, Clerk

APPENDIX G

19 U.S.C. § 1615

In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof * * *.

18 U.S.C. § 981

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property.

* * *

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section * * *.

18 U.S.C. § 1955

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

* * *

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions.

18 U.S.C. § 1956

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part -

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1957

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

JUL 12 2000
CLERK

(2)

No. 99-1501

In the Supreme Court of the United States

DONALD G. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

LISA SIMOTAS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under 19 U.S.C. 1615, as applicable before enactment of the Civil Asset Forfeiture Reform Act of 2000, once the government demonstrated probable cause to institute a forfeiture action, the burden of proof shifted to the claimant to avoid forfeiture. The question presented is whether that allocation of the burden of proof violates the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

No. 99-1501

DONALD G. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is unpublished, but the judgment is noted at 191 F.3d 461 (Table). The opinion of the district court (Pet. App. 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1999. The petition for rehearing was denied on December 10, 1999 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on March 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on two counts of illegal gambling, in violation of 18 U.S.C. 1955; one count of money laundering, in violation of 18 U.S.C. 1956; and 26 counts of engaging in monetary transactions in criminally-derived property, in violation of 18 U.S.C. 1957. The court of appeals affirmed. *United States* v. *Ford*, 184 F.3d 566 (6th Cir. 1999), cert. denied, 120 S. Ct. 1175 (2000). In a related civil proceeding, at issue here, the district court granted the motion of the United States for summary judgment of forfeiture as to four parcels of real property and two lots of currency. The court of appeals affirmed.

1. In 1989, petitioner and his then-wife, Margaret Ford, purchased four contiguous parcels of real property in Louisville, Kentucky. Petitioner built a large bingo hall on three of the parcels, which he intended to rent to charities seeking to conduct bingo games as a fund-raising activity. Under Kentucky law, "charitable gaming" can constitute a defense to prosecution for illegal gambling. Petitioner sold the bingo hall to Clay Ballinger, but after Ballinger defaulted on his payments in December 1991, petitioner reassumed ownership of the hall. Pet. App. 2a.

The Regular Veterans Association (RVA) is a national organization that supports veterans and members of the military. In late 1991, petitioner organized a post of the RVA (RVA Post #1), and registered it as an entity that would conduct charitable gaming in Louisville. Petitioner appointed long-time friends and family members as officers of RVA Post #1, and at its first meeting, petitioner loaned $50,000 to the Post. In

December 1991, RVA Post #1 began to sponsor bingo events at petitioner's bingo hall. Pet. App. 2a-3a; C.A. Br. 9-10.

In February 1992, petitioner purchased a meeting hall located directly across the street from the bingo hall. Petitioner paid $144,000 for the meeting hall (RVA hall). Later that month, petitioner sold the RVA hall to RVA Post #1 for $375,000. RVA Post #1 paid petitioner $75,000 in cash upon execution of the contract, and spent $74,000 to repair, renovate, and furnish RVA hall. RVA Post #1's only known source of income was proceeds from the gambling events it sponsored at petitioner's bingo hall. Pet. App. 3a.

From January 1, 1992, through August 28, 1992, local RVA posts sponsored gambling events at the bingo hall. Petitioner charged rent for each gaming session conducted at the bingo hall. The proceeds from the games and profits from the concession stand were deposited daily into the checking account of petitioner's closely held corporation, and only periodically distributed to the RVA posts. Petitioner also stashed large sums of the bingo proceeds in safe deposit boxes at various Louisville banks. Petitioner had no other known source of large sums of cash. Pet. App. 3a-4a.

2. Following an investigation by the Internal Revenue Service and local law enforcement, the United States filed a complaint seeking civil forfeiture of the bingo hall, RVA hall, a private residence, and six lots of United States currency seized in searches of the bingo hall and assorted safe deposit boxes. The United States alleged that the property had been used in an illegal gambling business or involved in financial transactions in criminally derived property. The United States sought forfeiture of the property under 18 U.S.C. 1955(d) and 18 U.S.C. 981(a)(1)(A). Pet. App. 4a-5a.

In August 1993, a federal grand jury indicted petitioner on various counts of illegal gambling, money laundering, and engaging in monetary transactions in criminally-derived property. In November 1996, petitioner was convicted on those counts. Following petitioner's convictions, the government moved for summary judgment in the forfeiture action. Pet. App. 5a..

The district court granted the government's motion in substantial part. Pet. App. 20-31. The court noted that, under the forfeiture statutes, once the government establishes probable cause to institute the forfeiture action, the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture. *Id.* at 21a-22a. Relying on Sixth Circuit precedent, the court rejected petitioner's argument that the government must establish that property is subject to forfeiture by clear and convincing evidence. *Id.* at 22a.

Applying the settled statutory framework, the district court first held that petitioner could raise no factual issue to oppose forfeiture of the three parcels of property devoted to the bingo hall because "illegal gambling actually occurred there." Pet. App. 23a. The court next found that "the evidence clearly and convincingly proves that the [RVA hall] was used as and in connection with an illegal gambling operation." *Ibid.* In that regard, the court noted that petitioner completely controlled the RVA; that the RVA sponsored most of the illegal gambling events at the nearby bingo hall; and that "the RVA and the RVA Hall had no existence apart from" the "central" role they played in petitioner's illegal gambling operation. *Ibid.* Finally, the court concluded that the cash seized at the bingo hall and from petitioner's safe deposit box was derived

from petitioner's gambling operation. *Id.* at 24a-25a. The court rejected petitioner's argument that the funds cannot be traced to his gambling operation because they were derived from the concession stand operations. "Without the illegal gambling operation," the court reasoned, "the concession stand would not have existed. The concession stand was an important and expected part of the entire bingo scene." *Id.* at 24a.

3. In an unpublished per curiam opinion, the court of appeals affirmed. Pet. App. 1a-19a. The court rejected petitioner's contention that the burden of proof set forth in 19 U.S.C. 1615, and incorporated by reference in 18 U.S.C. 981(d) and 18 U.S.C. 1955(d), violates due process. The court noted that under the terms of Section 1615, once the government establishes probable cause for the institution of the suit, the burden of proof is on the claimant. Pet. App. 7a. The court further noted that the Sixth Circuit's standard practice has been to "place on claimants the evidentiary burden to show by a preponderance of the evidence that forfeiture is not warranted." *Ibid.*

The court of appeals rejected petitioner's contention that this Court's decisions in *Austin* v. *United States*, 509 U.S. 602 (1993), and *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), required a contrary conclusion. The court reasoned that *James Daniel Good Real Property* held only that, absent exigent circumstances, the Due Process Clause requires notice and an opportunity to be heard before the government seizes real property under the forfeiture statutes. The court also noted that, in holding that forfeitures are subject to the limitations of the Eighth Amendment's Excessive Fines Clause, this Court in *Austin* did not rest its analysis on characterizing forfeiture as criminal or quasi-criminal. Pet. App. 8a. The

court of appeals emphasized, moreover, that in *United States* v. *Ursery*, 518 U.S. 267 (1996), this Court refused to extend *Austin*'s punishment rationale to the Double Jeopardy Clause. To the contrary, the court noted, this Court held that "[t]here is little doubt that Congress intended [forfeitures under 18 U.S.C. 981] to be civil proceedings," and that there is "little evidence" to suggest that such proceedings "are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." Pet. App. 8a (quoting *Ursery*, 518 U.S. at 288, 290).

Judge Clay dissented. Pet. App. 14a-19a. In his view, the burden of proof allocation set forth in 19 U.S.C. 1615 "violates the Fifth Amendment's protection against loss of property without due process of law." Pet. App. 15a. He concluded that the government should be required to "establish at minimum that forfeiture is supported by a preponderance of the evidence–a typical burden in civil proceedings–before the burden of proof may shift to the claimant to demonstrate that he is entitled to keep his property." *Ibid.*

ARGUMENT

Petitioner contends that the burden of proof for civil forfeitures established in 19 U.S.C. 1615 violates the Due Process Clause of the Fifth Amendment. That contention is without merit and does not warrant review.

Section 1615 provides as follows:

> In all suits or actions * * * brought for * * * forfeiture * * * where the property is claimed by any person, the burden of proof shall lie upon such claimant; * * * *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court * * *.

19 U.S.C. 1615. That method for allocating the burden of proof also governs forfeiture actions instituted under the provisions at issue here. See 18 U.S.C. 981(d), 1955(d). Every court of appeals that has considered the question has upheld that burden of proof allocation against due process challenge. See *United States* v. *$129,727 U.S. Currency*, 129 F.3d 486, 491-494 (9th Cir. 1997), cert. denied, 523 U.S. 1065 (1998); *United States* v. *One Beechcraft King Air 300 Aircraft*, 107 F.3d 829, 829-830 (11th Cir. 1997) (per curiam); *United States* v. *$94,000 in U.S. Currency*, 2 F.3d 778, 782-784 (7th Cir. 1993); *United States* v. *228 Acres of Land*, 916 F.2d 808, 814 (2d Cir. 1990); *United States* v. *Santoro*, 866 F.2d 1538, 1543-1544 (4th Cir. 1989); *United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895, 900 (1st Cir. 1987); *Bramble* v. *Richardson*, 498 F.2d 968, 970-973 (10th Cir. 1974). This Court has repeatedly denied petitions for a writ of certiorari that have challenged that allocation of the burden of proof on due process grounds. See *Trujillo* v. *United States*, 523 U.S. 1065 (1998); *Scianna* v. *United States*, 519 U.S. 932 (1996); *Moreno* v. *United States Drug Enforcement Admin.*, 498 U.S. 1091 (1991); *Aponte* v. *United States*, 466 U.S. 994 (1984). For several reasons, review is unwarranted in this case as well.

First, after the instant petition was filed, Congress enacted legislation altering the burden of proof in civil forfeiture actions. The Civil Asset Forfeiture Reform Act of 2000 contains the following provision:

> (c) BURDEN OF PROOF.—In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property —
>
> (1) the burden of proof is on the Government to establish, by a preponderance of the

> evidence, that the property is subject to forfeiture;
>
> (2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and
>
> (3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

Pub. L. No. 106-185, § 2(a), 114 Stat. 205-206. Those provisions apply to civil forfeiture actions brought under 18 U.S.C. 981 and 1955, the statutes at issue here. See § 2(b), 114 Stat. 210.

As the text of the new statute makes clear, in future actions to forfeit property under Sections 981 and 1955, the burden is no longer on the claimant to avoid forfeiture once the government establishes probable cause to initiate a forfeiture action. Under the new statute, the government must establish "by a preponderance of the evidence" that the property is subject to forfeiture. The question raised by petitioner—whether the Due Process Clause permits the government to forfeit property upon a showing of probable cause, unless the defendant shows by the preponderance of the evidence that the property is not forfeitable—is therefore of no continuing importance.

Second, even if the question presented were of prospective importance, this case would present a poor

vehicle for resolving it. The evidence submitted by the government in support of forfeiture in this case readily satisfies both the preponderance of the evidence standard suggested by the dissent and the clear and convincing standard espoused by petitioner. As petitioner's criminal convictions demonstrate, the government proved beyond a reasonable doubt that illegal gambling actually occurred at the bingo hall. See Pet. App. 23a. The district court also found that "the evidence clearly and convincingly proves" that the RVA hall was "used as and in connection with an illegal gambling operation." *Ibid.* And there was "overwhelming evidence in the record" to establish that the two lots of seized currency were proceeds from petitioner's gambling operation. *Id.* at 3a-4a, 24a-25a. Thus, the three parcels of land devoted to the gambling hall, the RVA hall, and the two lots of seized currency are all subject to forfeiture, regardless of the applicable burden of proof.

Finally, petitioner's constitutional challenge lacks merit. Since the earliest days of our nation, forfeiture statutes have placed the burden of proof on the claimant to avoid forfeiture once the government established probable cause to initiate a forfeiture proceeding. For example, a revenue collection Act of 1799 provided:

> [I]n actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case, the *onus probandi* shall lie upon such claimant; * * * but the *onus probandi* shall lie on the claimant, only where probable cause is shown for the prosecution, to be judged of by the court before whom the prosecution is had.

Act of Mar. 2, 1799, ch. 22, § 71, 1 Stat. 678. As this Court recently reaffirmed, "[e]vidence of a longstanding legislative practice 'goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice.'" *United States* v. *Ursery*, 518 U.S. 267, 276 (1996) (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-328 (1936)).

Moreover, in several cases, this Court has applied the forfeiture laws' probable cause standard without ever suggesting that such a standard might be constitutionally infirm. In *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813), for example, the Court concluded that the evidence offered by the government furnished "just cause to suspect" that certain goods were subject to forfeiture. The Court rejected the claimant's contentions that "this [wa]s not enough to justify the Court in requiring exculpatory evidence" from him and that guilt "must be proved, before the presumption of innocence can be removed." *Ibid.* Applying the plain terms of the 1799 statute, the Court concluded that

> the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.

Ibid. See also, *e.g.*, *The John Griffin*, 82 U.S. (15 Wall.) 29, 33 (1872) (finding that government established clear prima facie case for forfeiture, which "both by the statutes and the ordinary rules of evidence required of the claimant such testimony as should satisfactorily

rebut the presumption of guilt which it raised"); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 366 (1842) (finding government's proof established probable cause and affirming jury instructions placing onus probandi on the claimant).

Petitioner's reliance (Pet. 11-12) on *Santosky* v. *Kramer*, 455 U.S. 745 (1982), and *Addington* v. *Texas*, 441 U.S. 418 (1979), as support for a clear and convincing evidence standard is misplaced. Those cases hold that due process requires the government to adduce clear and convincing evidence in order to obtain a judgment terminating parental rights or a judgment of involuntary civil commitment. The crucial factor in those cases was that they implicated "fundamental liberty interest[s]" (*Santosky*, 455 U.S. at 753) of great "weight and gravity" (*Addington*, 441 U.S. at 427). This case does not implicate such a fundamental liberty interest. Instead, it involves the loss of property and money. That distinction is significant. As explained in *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 424), "[t]his Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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